THE MODERN LAW REVIEW

EDITORIAL BOARD

Sir MAURICE SHELDON AMOS, K.C.
Rt. Hon. E. LESLIE BURGIN, LL.D., M.P.
JOHN G. FOSTER, Esq., M.A.
Professor MORRIS GINSBERG, M.A., D.Litt.
Professor A. L. GOODHART, LL.D., D.C.L.
Professor H. C. GUTTERIDGE, LL.D., K.C.
R. O'SULLIVAN, Esq., K.C.

EDITORIAL COMMITTEE

R. S. T. CHORLEY, M.A., *General Editor.*
G. W. KEETON, M.A., LL.D., *Business Editor.*
J. GOLD, LL.M., *Magazine Editor.*
L. C. B. GOWER, LL.M., *Editor for Cases and Statutes.*
W. FRIEDMANN, LL.M., Dr. Jur., *Review Editor.*
J. UNGER, LL.B., *Secretary.*

Vol. I JUNE, 1937 No. I

CONTENTS

	PAGE		PAGE
The Problems of a Functional Jurisprudence . . .	5	Modern Trends in the Law of Torts	39
A Scale of Values in the Common Law	27	Statutes	64
		Notes of Cases	73
		Reviews	84

EDITORIAL NOTES

IN this first number of THE MODERN LAW REVIEW some apologia is perhaps needed for the appearance of yet another journal devoted to the discussion of legal topics. The Editorial Committee feel that they cannot put their point of view better than it appears in the following quotation from the circular which they addressed to the profession and to others who might be interested.

English legal periodicals have hitherto dealt almost exclusively with the technical aspects of the law treated from such varying points of view as the historical, analytical, or descriptive. Although this approach is, and must always remain, indispensable, a group of lawyers, including members both of the teaching and the practising branches of the profession, have for some time been thinking that it isolates the law too much from those contemporary social conditions in which it must always operate, and cannot therefore be safely used as an exclusive method of legal thinking. They have decided accordingly to start a new periodical to be called THE

MODERN LAW REVIEW, which it is hoped will usefully supplement the existing periodical literature.

The REVIEW deals with the law as it functions in society and primarily with English Law in its relation to contemporary English conditions and problems. For this purpose, however, it will necessarily have to consider the treatment of similar conditions and problems in other countries, and especially those with closely related systems, such as the British Dominions and the U.S.A. It will take as its field also those branches of scientific study in which law is an important but not the only factor. To take a few examples: problems of punishment and recidivism must interest the criminal lawyer as well as the criminologist; problems of monopoly are of primary interest to the economist, but they are closely affected and controlled by legal rules as to restraint of trade; the problem of adjusting the law of defamation to modern conditions with their enormous growth of newspapers and other printed matter calls for the careful consideration both of the lawyer and the legislator; the problem of how far the mass of industrial legislation actually affects the lives of the industrial population whose social and economic condition it is intended to protect, and of its effect on economic conditions generally, is of importance to the lawyer as well as to the economist and sociologist.

Conversely it is important to be acquainted with the particular social conditions and ideas which produce the law, whether in statutes or cases. The inarticulate major premise is dominant not only in the judge but in the legislator and the administrator; all these are often faced with problems and decisions which demand a clear conception of the social basis of the law.

Again, the recent history of English Law has been one of continual reform and re-adaptation. This is a process which it is believed must go on for a long period. All projects of reform should be subjected to searching analysis and discussion in their early stages. In the past the legal journals have not taken a very prominent part in this necessary process, which has, for the most part, been left to the lay press. It is intended to make constructive proposals for, and criticism in connection with, legal reform a special feature of the REVIEW.

These and many other aspects of the law will be regarded as within the scope of THE MODERN LAW REVIEW.

We have only been able to embark upon this venture because of the generous support of a number of well wishers who have given guarantees towards meeting the possible deficit. In particular we would mention the subscription by the Behr Trustees of thirty pounds. After an experimental period, however, the REVIEW must pay its way, so that we appeal to readers to bring its existence to the notice of their friends and others who may be interested so that the number of subscribers may be increased.

PREFATORY NOTE

I HAVE been asked at the launching of THE MODERN LAW REVIEW to perform the customary ceremony of breaking a bottle of wine on its bows in token of good wishes for the prosperity of the new venture. Happily an exacting standard is not applied to the vintage employed on such occasions; I should otherwise have felt some trepidation in taking part in this symbolic act, for the occasion is one of no little significance.

In the first place, though it relies on advice and support from other centres of learning and from the practising profession, the REVIEW originates with and its editorial committee consists of a group of teachers in the vigorous Law School of the University of London, hitherto voiceless. This in itself is matter for congratulation. But perhaps more important is the specific contribution which its promoters design to make to legal literature. A Law School situated in the greatest city of the world must have an outlook of its own. Law is studied here not in a cloistered academy, but at the very heart of a busy community. At hand are the myriad activities of a vast population which provide unrivalled opportunities for the observation of law in daily operation, not only in the courts and in parliament, but in the market place and in the life of the people. It is inevitable that those who study law in such surroundings should be alive to its social, economic and political aspects, and it is to the discussion of these aspects of the science of law that this journal, as I understand, is to be primarily devoted. The field is a wide one which is only beginning to be cultivated and may well yield interesting and profitable crops.

The epithet "modern" may arouse some misgiving. Law has always been regarded as a conservative science, for its business is the conservation of life, liberty, and property, and its most resolute maxim is *stare decisis*. In some quarters impatience with this characteristic of the law has grown up and a desire has been manifested to make it the servant of the executive and the exponent of the political or economic views of the dictator of the moment, whether autocratic or proletarian. And there is another aspect of modernity which is distasteful, a pert assumption that tradition and authority have nothing to teach us and that if we only use a new-fangled and sufficiently portentous vocabulary we are necessarily thinking new thoughts. It is not, I am sure, because of these implications of the word that it has been used in the title of this Journal, but rather to serve as a reminder, in

the words of Lord Asquith, that the Common Law of England "is not a compendium of mechanical rules written in fixed and indelible characters, but a living organism which has grown and moved in response to the larger and fuller development of the nation." "To confine principles to circumstances peculiar to a past generation," said Lord Stowell, "is in effect to negative the application of those principles."

So it may be said with truth that there is no more valuable, as there can be no more attractive, study than that of the problems presented by the adaptation of law to the constantly changing requirements of the community. To assist in the wise adjustment of the law to new needs and new conditions and in perfecting it as the instrument of justice between man and man would be a fine service both to the law itself and to the State. I hope that THE MODERN LAW REVIEW will render it.

MACMILLAN.

THE PROBLEMS OF A FUNCTIONAL JURISPRUDENCE

IN the lists of jurisprudence, the champion of a new theory is generally expected to prove the virtue of the lady for whom he fights by splitting the skulls of those who champion other ladies. Yet despite the struggle of schools that has been waged for the last forty years in our law reviews,[1] it is possible, I think, to defend the functional approach in jurisprudence without attacking the doctrines or the achievements of any other school.

In jurisprudence as in other fields of thought, we are more likely to reach a just appraisal of a new school by asking not, "What thesis does it defend?" but rather, "What question does it put?" The most significant advances in intellectual history are characterised by the focusing of critical attention upon facts and issues which were formerly considered unimportant, indecent, or self-evident.

Modern physics begins when Galileo and his fellow workers first formulate such problems as, "How fast does a falling body fall?" Galileo is distinguished from his predecessors not because they differed in their answers to such questions, but rather because Galileo thought such questions were worth answering while earlier "natural philosophers" had considered such questions trivial as compared with theological or teleological questions concerning "perfect motion" and the "proper place" of things in the world-scheme.

The remarkable intellectual advance achieved during the past century in formal logic is very largely based upon the initiative of such mathematicians as Lobachewsky and Riemann, who,

[1] See Holmes, "The Path of the Law" (1897), 10 *Harvard Law Review*, 457, *Collected Legal Papers* (1920), 167; Pound, "Law in Books and Law in Action" (1910), 44 *American Law Review*, 12; Pound, "Mechanical Jurisprudence" (1908), 8 *Columbia Law Review*, 605; M. R. Cohen, "The Process of Judicial Legislation" (1914), 48 *American Law Review*, 161; *Law and the Social Order* (1933), 112; Cook, "Logical and Legal Bases of the Conflict of Laws" (1924), 33 *Yale Law Journal*, 457; Oliphant, "A Return to *Stare Decisis*" (1928), 6 *American Law School Review*, 215; Llewellyn, "A Realistic Jurisprudence—The Next Step" (1930), 30 *Columbia Law Review*, 431; Pound, "The Call for a Realist Jurisprudence" (1931), 44 *Harvard Law Review*, 697; Llewellyn, "Some Realism about Realism—Responding to Dean Pound" (1931), 44 *Harvard Law Review*; Kantorowicz, "Some Rationalism about Realism" (1934), 43 *Yale Law Journal*, 1240; John C. H. Wu, "Realistic Analysis of Legal Concepts: A Study in the Legal Method of Mr. Justice Holmes" (1932), 5 *China Law Review*, 1, 2; Yntema, "The Rational Basis of Legal Science" (1931), 31 *Columbia Law Review*, 925; M. R. Cohen, "Philosophy and Legal Science" (1932), 32 *Columbia Law Review*, 1103, *Law and the Social Order* (1933), 219; F. S. Cohen, "Transcendental Nonsense and the Functional Approach" (1935), 35 *Columbia Law Review*, 809.

challenging the "self-evidence" of Euclid's parallel postulate, asked: "What consequences will follow from geometric assumptions other than those of Euclid?" The result of such investigations was not to "disprove" Euclidean geometry, but rather to show it in its true perspective as one logical system within a matrix of systems, all of which have possible applications to the actual world.

If history-writing is on a more realistic plane to-day than it was a century ago, this is certainly due very largely to the work of Karl Marx. Non-socialist historians may reject entirely the thesis of the class struggle, and even the general doctrine of social evolution, but they cannot reject or forget the insistent questions that Marx put, "How is this or that event related to the system of production and distribution that prevails at the time and place?" Certainly the persistent reiteration of this question in fields of social organisation, politics, morality, and law is the first characteristic that distinguishes modern history-writing from the pre-Marxian histories that ascribe most historical events to the character of the sovereign, the fortunes of warfare, or the spirit of peoples.

Similarly it might be shown that in fields of biology, economics, psychology, and philosophy, to mention no others, the enduring contributions of new schools of thought have been not the new theories they have defended, which have more often than not turned out to be erroneous, but the new questions they have put.

Let us then survey the role of functionalism in legal science not as a refutation of past theories of law nor even as an improvement in our present methods of legal research, but rather as an insistence on certain questions that until recently have been generally ignored in legal studies. Specifically, the functional method poses such questions as: How do rules of law work? Are certain rules of law, so-called, merely ritual observances which have no verifiable relation to the decisions of judges who recite them? To what extent are laws actually obeyed? What are the limits of effective law enforcement? What are the social mechanisms and institutions that make certain rules of law effective and leave others dead letters? When rules of law are obeyed or disobeyed, what consequences actually follow from such conduct?

More generally, these questions may be compressed in the formula, "What is the human meaning of the law?" This is a very different question from the question, "How has law developed?" which historical jurists have asked and answered. It is

very different from the question, "What is the nature or structure of law?" with which analytical jurists have been concerned. It is very different from the question, "What is the purpose of law?" which writers on justice and natural rights have pressed.

Precisely because it is a very different question from these questions that have occupied so large a part of traditional jurisprudence, the question of the human significance of law must be posed as a supplement to established lines of inquiry in legal science rather than as a substitute for them. Indeed, there is an intimate and mutual interdependence among these lines of inquiry, historical, analytical, ethical, and functional.

The law of the present is a tenuous abstraction hovering between legal history and legal prophecy. The functionalist cannot describe the present significance of any rule of law without reference to historical elements. It is equally true that the historical jurist cannot reconstruct the past unless he grasps the meaning of the present.

The functionalist must have recourse to the logical instruments that analytical jurisprudence furnishes. Analytical jurisprudence, in turn, may develop more fruitful modes of analysis with a better understanding of the law-in-action.

Functional description of the workings of a legal rule will be indispensable to one who seeks to pass ethical judgments on law. The functionalist, however, is likely to be lost in an infinite maze of trivialities unless he is able to concentrate on the *important* consequences of a legal rule and ignore the *unimportant* consequences, a distinction which can be made only in terms of an ethical theory.

Recognising then, that functional jurisprudence is not a new set of answers to the traditional problems of jurisprudence, nor even a new method of getting such answers, but rather a new set of problems, let us examine the issues which are thus brought to the forefront of legal consciousness. In general, these issues may be considered under two headings: the analysis of law as a function of judicial behaviour; and the appraisal of law as a determinant of human behaviour.

Functionalism, as a philosophy, may be defined as the view that a thing does not have a "nature" or "essence" or "reality" underlying its manifestations and effects and apart from its relations with other things; that the nature, essence, or reality of a thing *is* its manifestations, its effects, and its relations with other things; and that, apart from these, "it" is nothing, or at most a point in logical space, a possibility of something happening.

To defend this philosophical viewpoint,[2] or even to canvas the applications of this viewpoint in modern science[3] would take us beyond the assigned limits of this paper. We shall concern ourselves not with the truth or falsity of a doctrine but with the significance of functionalism as a methodologic principle. Functionalism as a method may be summed up in the directive: If you want to understand something, observe it in action.

Applied within the field of law itself, this approach leads to a definition of legal concepts, rules, and institutions in terms of judicial decisions or other acts of state-force. Whatever cannot be so translated is functionally meaningless.[4] Applied to the larger field of general human behaviour, this same approach leads to an appraisal of law in terms of conduct of human beings who are affected by law. In the former field, the outcome of the functional approach is generally designated as "realistic jurisprudence." In the latter field, the outcome of the functional approach is usually called "sociological jurisprudence." There is, however, no well-recognised definition of these schools of thought,[5] and I think it is fair to say that "realistic" and "sociological"

[2] The viewpoint is something common to logical positivism, pragmatism, operationalism, and Whitehead's "method of extensive abstraction." See C S. Peirce, *Chance, Love and Logic* (1923); *Collected Papers* (1931–34), especially vol. 5; James, *Pragmatism* (1908); *Essays in Radical Empiricism* (1912); Dewey, "Appearing and Appearance," in *Philosophy and Civilisation* (1931), 51; Russell, *Our Knowledge of the External World as a Field for Scientific Method in Philosophy* (1914); *Mysticism and Logic* (1918); Whitehead, *The Principles of Natural Knowledge* (1919); *The Concept of Nature* (1920); C. I. Lewis, *Mind and the World-Order* (1929); C. D. Broad, *Scientific Thought* (1923); Wittgenstein, *Tractatus Logico-Philosophicus* (1922); Carnap, "Ueberwindung der Metaphysik durch logische Analyse der Sprache" (1932), 2 *Erkenntnis*, No. 4; J. E. Boodin, "Functional Realism" (1934), 43 *Philosophical Review*, 147.

[3] See, for applications of a similar approach—

In mathematics: Russell, *Introduction to Mathematical Philosophy* (1919).

In psychology: W. James, *Essays in Radical Empiricism* (1912).

In religion: Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (trans. by Parsons, 1930); R. H. Tawney, *Religion and the Rise of Capitalism* (1926); James, *The Varieties of Religious Experience* (1902); Kaplan, *Judaism as a Civilisation* (1934), c. 26 ("Functional Method of Interpretation").

In anthropology: Boas, *Primitive Art* (1927); Boas, "The Social Organisation and the Secret Societies of the Kwakiutl Indians" (1895), *Report of United States National Museum*, at 315; Malinowski, *The Family among the Australian Aborigines* (1913); Lowie, *Primitive Society* (1920); Goldenweiser, *History, Psychology and Culture* (1933), Part III (Totemism); Malinowski, *Crime and Custom in Savage Society* (1926); Hogbin, *Law and Order in Polynesia* (1934).

In political science: W. J. Shephard, "Democracy in Transition" (1935), 29 *American Political Science Review*, 1; cf. H. J. Laski, *Grammar of Politics* (2nd edition, 1929); W. Y. Elliott, *The Pragmatic Revolt in Politics* (1928).

[4] Cf. F. S. Cohen, "Transcendental Nonsense and the Functional Approach" (1935), 35 *Columbia Law Review*, 809.

[5] There is a good deal of overlapping, for instance, in the programme of sociological jurisprudence offered by Dean Pound, and the programme of realistic jurisprudence outlined by Llewellyn. Cf. Pound, "Scope and Purpose of Sociological Jurisprudence" (1912), 25 *Harvard Law Review*, 489, 512–515; and Llewellyn, "Some Realism about Realism—Responding to Dean Pound" (1931), 44 *Harvard Law Review*, 1222, 1236–1255.

jurisprudence are in part complementary and in part overlapping, but in no way antithetical, and that both spring from a common sceptical, scientific, anti-supernatural, functional outlook.

Law as a Function of Judicial Decisions

Perhaps one reason why jurisprudence has been so slow in discovering the social content of legal rules and legal concepts is that jural facts, unlike the facts of physics or biology, generally purport to be self-explanatory. It has generally been considered an impertinence verging on political blasphemy to question the adequacy of these explanations. The statute carries on its face its intended effects; the decision of a court, if important, is generally accompanied by a rationale in the form of a judicial opinion; most of the acts of subordinate legal officials are surrounded by explanatory words and ritual. To take these explanations at their face value is at once a mark of political decorum and a release from arduous tasks of research.

The trends of modern jurisprudence that we call functional are inaugurated by sceptics who refuse to take these explanations at their face value and demand hard coin of social fact in place of paper legalities. Some of these sceptics have suggested that the words of a statute often have only the most superficial resemblance to the workings of the statute. A good deal of statute law turns out under investigation to be without any force—law-in-books rather than law-in-action; other parts of the statute law have been given new meanings in judicial, administrative, and popular construction—meanings that could never have been deduced from the words of the legislature. In either case, study of the statutes fails to provide a realistic picture of functioning law. Again, this sceptical spirit has been applied to the official discourses in which judges set forth the reasons for their decisions. Judicial opinions have been viewed as no more and no less reliable than the statements in which octogenarians, golf champions, or successful bankers explain their achievements. In place of judicial introspection, or at least as a corrective for its deficiencies, we are invited to examine unmentioned factors leading to a given decision. These factors may range from weakness of intellect or digestive disturbances to political beliefs or economic backgrounds.

Under this sceptical gaze, a good many of the revered rules and principles of the law turn out to be pious frauds, contradicted by the actual holdings in decided cases, others turn out to be so ambiguous that they have no predictive or scientific value, and still others turn out to be disguised tautologies, similar to the

doctrine established by Molière's physician, that opium puts men to sleep because it contains a dormitive principle.

The actual course of judicial decisions, conceived as a field of historical events rather than as a branch of geometry, reveals a much larger degree of uncertainty in the law than traditional jurisprudence has recognised. One of the most learned of living judges confesses to

> "a mounting sense of wonder that with all our centuries of common law development, with all our multitudinous courts, and still more multitudinous decisions, there are so many questions, elementary in the sense of being primary and basic, that remain unsettled even now. . . . One wonders how one has attained maturity without getting oneself in trouble when one has been so uncertain all along of the things that one might so in affairs of primary concern. Take such fundamental privileges or claims of privilege as these—the privilege to employ force against another who threatens one with bodily harm; the privilege to employ force to effect a recaption of chattels taken from one's custody; the privilege to employ force to effect an entry upon land. It is astonishing how obscure and confused are the pronouncements upon these fundamental claims of right."[6]

The extent of actual uncertainty in the body of the law is obscured by the legal fiction that courts do not make law but merely declare the law that already exists.[7] It is further obscured by linguistic conventions that give the appearance of certainty where there is no certainty.

> "Lawyers use what the layman describes as 'weasel words,' so-called 'safety-valve concepts,' such as 'prudent,' 'negligence,' 'freedom of contract,' 'good faith,' 'ought to know,' 'due care,' 'due process,'—terms with the vaguest meaning—as if these vague words had a precise and clear definition; they thereby create an appearance of continuity, uniformity and definiteness which does not in fact exist."[8]

Again the appearance of certainty is served by the verbal convention that established principles of law are never "refuted" but only "distinguished." Legal principles have a habit of running

[6] Cardozo, *Paradoxes of Legal Science* (1927), pp. 76–77.

[7] "The fiction that judges do not legislate has long since been abandoned by all who care for a conscious and realistic jurisprudence." H. J. Laski, "Judicial Review of Social Policy in England, A Study of *Roberts* v. *Hopwood et al.*" (1926), 39 *Harvard Law Review*, 832. Cf. M. R. Cohen, "The Process of Judicial Legislation," *supra*, note 1.

[8] Jerome Frank, *Law and the Modern Mind* (1930), p. 27.

in pairs, a plaintiff principle and a defendant principle.[9] As in the domain of popular proverbs one appeals with equanimity to the caution, "Look before you leap," or to its opposite, "He who hesitates is lost," depending upon which course of action he prefers, so in the law one generally has a choice between opposite "principles." Writers of legal treatises have no compunction about setting the two principles side by side, with only a "but" or "however" between them for the sake of decency. But in the actual decision of cases the choice between conflicting principles is likely to depend on unstated considerations. Mr. Justice Holmes was one of the first to take judicial notice of the inconclusiveness of legal principles.

> "The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community, or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. . . .
>
> "I think that the judges themselves have failed adequately to recognise their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said. When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions to which I refer. . . . I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see

[9] Yntema, "The Hornbook Method and the Conflict of Laws" (1928), 37 *Yale Law Journal*, 468.

that they were taking sides upon debatable and often burning questions."[10]

To recognise this element of choice in the judicial process is to make the study of social factors that determine the course of judicial decision an essential part of the lawyer's outfitting if he is to predict with accuracy the probable legal course of his client's plans. To quote from Mr. Justice Cardozo's revealing study of the judicial process:

> "The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empires of these subconscious loyalties."[11]

Professor Laski has recently observed, in somewhat the same vein:

> ". . . no true science of law is possible unless its assumptions are built on a philosophy of history that enables us to predict the large consequences of the system in which we are involved."
>
> ". . . Once we realise that the legal relations of society are, broadly speaking, the expressions of class relations, once we recognise in the state supreme coercive power held at the disposal of those who own the instruments of production, the processes of law begin to clarify themselves in a fundamental way."[12]

Undoubtedly Professor Laski and Justice Cardozo would differ profoundly in analysing the social determinants of law. What is significant is that, despite these differences of social viewpoint, there is agreement on the direction of research required if one would understand the course of judicial decisions. Such understanding cannot be achieved within the confines of legal science traditionally conceived.

Fifty years ago Langdell wrote, "Law is a science, and all the available materials of that science are contained in printed books."[13] To-day we are disposed to recognise that judges are human beings, and that not all the forces which motivate judicial behaviour are words in printed books. There is, of course, wide difference of opinion as to the comparative importance of different

[10] Holmes, "The Path of the Law," *supra*, note 1, pp. 181, 184.
[11] Cardozo, *The Nature of the Judicial Process* (1921), pp. 174–175.
[12] Harold J. Laski, Book Review (1936), 46 *Yale Law Journal*, 951, 952.
[13] 3 *Law Quarterly Review*, 123–124.

fields of knowledge in helping us to predict judicial behaviour. Some are searching in fields of psychology and psychoanalysis,[14] without, I think, reaching any very significant results. Other students of the law have made illuminating studies of the social, economic, and political backgrounds of judges and decisions.[15] Equally useful studies are being made in the field of social institutional pressures that influence legislation.[16]

All this is of significance not merely to the legal philosopher but to the practising lawyer. The client who wants to know whether to organize a partnership or a corporation or whether to include a particular sort of renewal clause in his lease is not particularly interested in the present state of the law. He wants to know how the courts are likely to deal with the transaction some years hence. The solicitor who advises him must know more than words in law books if he is to give intelligent advice. There is need even in these narrow questions for social vision, knowledge, judgment, and the ability to weigh available evidence. Much more obvious is the need when the legal question presented involved the development of an important economic institution, social organization, or political instrumentality. The functional conception of legal science thus dictates a new vision of the scope of legal education. The student of law must be familiar not only with statutes and cases but with the social realities on which the statutes and cases impinge, and with the social realities that, in turn, impinge on courts and legislatures as determinants in the development of the law.[17] It is forty years, now, since Mr. Justice Holmes wrote:

"For the rational study of the law the black letter man

[14] Frank, "Law and the Modern Mind" (1930), c. 12–13; T. Schroeder, "The Psychological Study of Judicial Opinions" (1918), 6 *California Law Review*, 89; H. D. Lasswell, "Self-Analysis and Judicial Thinking" (1930), 40 *International Journal of Ethics*, 354; Hutcheson, "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decisions" (1929), 14 *Cornell Law Quarterly*, 274; Hutcheson, "Lawyer's Law and the Little, Small Dice" (1932), 7 *Tulane Law Review*, 1.

[15] See: Jerome Hall, *Theft, Law and Society* (1935), Appendix; Brooks Adams, "Law Under Inequality"; "Monopoly" in *Centralisation and the Law* (1906), Lecture 2; Boudin, *Government by Judiciary* (1932); Gustavus Myers, *History of the Supreme Court* (1912); W. Hamilton, "The Ancient Doctrine *Caveat Emptor*" (1932), 40 *Yale Law Journal*, 1133; Nelles, "The First American Labor Case" (1931), 41 *Yale Law Journal*, 165; Max Lerner, "The Supreme Court and American Capitalism" (1933), 42 *Yale Law Journal*, 668; C. G. Haines, "General Observations on the Effects of Personal, Political and Economic Influence in the Decisions of Judges" (1922), 17 *Illinois Law Review*, 96; R. A. Brown, "Police Power—Legislation for Health and Personal Safety" (1929), 42 *Harvard Law Review*, 866; M. Finkelstein, "Judicial Self-Limitation" (1924), 37 *Harvard Law Review*, 338.

[16] See, for example, Child: *Labor and Capital in National Politics* (1930).

[17] See Leon Keyserling: "Social Objectives in Legal Education" (1933), 33 *Columbia Law Review*, 437.

may be the man of the present, but the man of the future is the man of statistics and the master of economics."[18]

Pervading the realistic analysis of legal rules and concepts there is implicit a definition of law in terms of empirical realities. This definition has been most trenchantly formulated by Mr. Justice Holmes:

> "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. . . . Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics, or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[19]

Alternative functional definitions of law have been offered,[20] but all these definitions attempt to anchor the concept of law on a solid bottom of empirical fact. Perhaps the most important thing about these definitions is that they get away from the Blackstonian confusion that vitiates so much of traditional jurisprudence. Blackstone attempted to superimpose the picture of law as the perfection of reason[21] drawn by the tender-minded hypocrite, Coke, upon the picture of law as force[22] executed by the tough-minded cynic, Hobbes. The Blackstonian definition of law as a "rule of civil conduct prescribed by the supreme power in a State commanding what is right[23] and prohibiting what is

[18] "The Path of the Law," *supra*, note 1, 187.

[19] *Ibid.*, 171–173.

[20] See: Cardozo, *The Growth of the Law* (1924), 44, 52; C. J. Keyser, "On the Study of Legal Science" (1929), 38 *Yale Law Journal*, 413.

[21] Co. Litt. *976.

[22] "In matters of government, when nothing else is turned up, clubs are trumps." Hobbes, *Dialogue between a Philosopher and a Student of the Common Laws of England* (1681), "Of Punishments."

[23] That "right" and "wrong" are used in this definition as ethical, rather than strictly legal, terms is made clear in Blackstone's own exegesis upon his definition. *Comm.** 54–55.

wrong" provides a fertile source of confusion, which many important legal scholars since Blackstone have found about as useful in legal polemics as the ink with which a cuttlefish befuddles its enemies.

Those jurists who adhere to the Blackstonian definition of law are able to spin legal theories to the heart's content without fear of refutation. If legislatures or courts disagree with the writer's theory of "right" and "wrong" it is a simple matter to show that this disagreement is unjust, unreasonable, monstrous, and therefore, not "sound law." On the other hand, the intruding moralist who objects to a legal doctrine on the ground that it is unjust and undesirable can be told to go back to the realm of morality he came from, since the law is the command of the sovereign and not a matter of moral theory. Perhaps the chief usefulness of the Blackstonian theory is the gag it places upon legal criticism. If, by definition, the law is something that commands what is right and prohibits what is wrong, it is impossible to argue about the goodness or badness of any rule of law. And any definition that deters people from criticism of the law will prove very useful to legal apologists for the existing order of society. As a modern authority on legal reasoning declares:

> "Thus all things made legal are at the same time legally ethical because it is law, and the law must be deemed ethical or the system itself must perish."[24]

If the functionalists are correct, the meaning of a definition is found in its consequences. The definition of a general term like "law" is significant only because it affects all our definitions of specific legal concepts.

The consequence of defining law as a function of judicial decisions is that we may proceed to define such concepts as "contract," "property," "title," "corporate personality," "right," and "duty" similarly as functions of judicial decisions.[25]

The consequence of defining law as a hodge-podge of political force and ethical value ambiguously amalgamated is that every legal concept, rule or question will present a similar ambiguity.

Consider, for example, the elementary legal question: "Is there a contract?"

[24] Brumbaugh, *Legal Reasoning and Briefing* (1917), 7.

[25] See: M. R. Cohen, "Property and Sovereignty" in *Law and the Social Order* (1933), 41; R. L. Hale, "Coercion and Distribution in a Supposedly Non-coercive State" (1923), 38 *Political Science Quarterly*, 470; R. L. Hale, "Rate Making and the Revision of the Property Concept" (1922), 22 *Columbia Law Review*, 209; Llewellyn, *Cases and Materials on the Law of Sales* (1930); Oliphant, "Mutuality of Obligation in Bilateral Contracts at Law" (1929), 25 *Columbia Law Review*, 705; (1928), 28 *Columbia Law Review*, 997; Cook, "Logical and Legal Bases of the Conflict of Laws" (1924), 33 *Yale Law Journal*, 457.

When the realist asks this question, he is concerned with the actual behaviour of courts. For the realist, the contractual relationship, like law in general, is a function of legal decisions. The question of what courts *ought* to do is irrelevant here. When there is a promise that will be legally enforced there is a contract. So conceived, any answer to the question, "Is there a contract?" must be in the nature of a prophecy, based, like other prophecies, upon past and present facts. So conceived, the question, "Is there a contract?" or for that matter any other legal question, may be broken up into a number of subordinate questions, each of which refers to the actual behaviour of courts: (1) What courts are likely to pass upon a given transaction and its consequences? (2) What elements in this transaction will be viewed as relevant and important by these courts? (3) How have these courts dealt with transactions in the past which are *similar* to the given transaction, that is, *identical in those respects which the court will regard as important?* (4) What forces will tend to compel judicial conformity to the precedents that appear to be in point (e.g. inertia, conservatism, knowledge of the past, or intelligence sufficient to acquire such knowledge, respect for predecessors, superiors or brothers on the bench, a habit of deference to the established expectations of the bar or the public) and how strong are these forces? (5) What factors will tend to evoke new judicial treatment for the transaction in question (e.g. changing public opinion, judicial idiosyncrasies and prejudices, newly accepted theories of law, society or economics, or the changing social context of the case) and how powerful are these factors?

These are the questions which a successful practical lawyer faces and answers in any case. The law, as the realistic lawyer uses the term, is the body of answers to such questions. The task of prediction involves, in itself, no judgment of ethical value. Of course, even the most cynical practitioner will recognise that the positively existing ethical beliefs of judges are material facts in any case because they determine what facts the judge will view as important and what past rules he will regard as reasonable or unreasonable and worthy of being extended or restricted. But judicial beliefs about the values of life and the ideals of society are facts, just as the religious beliefs of the Andaman Islanders are facts, and the truth or falsity of such moral beliefs is a matter of complete unconcern to the practical lawyer, as to the scientific observer.

Washed in cynical acid,[26] every legal problem can thus be

[26] ". . . the vague circumference of the notion of duty shrinks and at the same time grows more precise when we wash it with cynical acid and expel everything except the object of our study, the operations of the law." Holmes, "The Path of the Law" (1897), *Harvard Law Review*, 457, 462.

interpreted as a question concerning the positive behaviour of judges.

There is a second and radically different meaning which can be given to our type question, "Is there a contract?" When a judge puts this question, in the course of writing his opinion, he is not attempting to predict his own behaviour. He is in effect raising the question, in an obscure way, of whether or not liability *should* be attached to certain acts. This is inescapably an ethical question. What a judge ought to do in a given case is quite as much a moral issue as any of the traditional problems of Sunday School morality.[27]

It is the great disservice of the classical conception of law that it hides from judicial eyes the ethical character of every judicial question, and thus serves to perpetuate class prejudices and uncritical moral assumptions which could not survive the sunlight of free ethical controversy.

The Blackstonian conception of law as half-mortal and half-divine gives us a mythical conception of contract. When the masters of classical jurisprudence ask the question, "Is there a contract?" they have in mind neither the question of scientific prediction which the practical lawyer faces, nor the question of values which the conscientious judge faces. If they had in mind the former question their studies would no doubt reveal the extent to which courts actually enforce various types of agreements.[28] Conclusions would be in terms of probability and statistics. On the other hand if our classical jurists were interested in the ethical aspects of contractual liability they would undoubtedly offer a significant account of the human values and social costs involved in different types of agreements and in the means of their enforcement. In fact, discussion will oscillate between a theory of what courts actually do and a theory of what courts ought to do, without coming to rest either on the existential plane of practice or on the ethical plane of values long enough to come to grips with significant problems. This confused wandering between the world of fact and the world of justice vitiates every argument and every analysis.

Intellectual clarity requires that we carefully distinguish

[27] Cf. F. S. Cohen, "Modern Ethics and the Law" (1934), 4 *Brooklyn Law Review*, 33.

[28] So hallowed is the juristic tradition of ignoring the actual facts of cases that a distinguished jurist, Professor Goodhart, can argue in all seriousness that the practice adopted by some American law libraries of putting the records of cases on file is very dangerous. Students might be distracted from the official *ratio decidendi* of the case, and try to discover what the actual facts of the case were, which would be a death-blow to traditional jurisprudence. See Goodhart "Determining the Ratio Decidendi of a Case" (1930), 40 *Yale Law Journal*, 161, 172.

between the two problems of objective description and critical judgment, which classical jurisprudence lumps under the same phrase. Such a distinction functional jurisprudence offers with the double-barrelled thesis: (1) that every legal rule or concept is simply a function of judicial decisions which may be described without reference to values, and (2) that the problem before the judge is not whether a legal rule or concept actually exists, but whether it *ought* to exist. Clarity on two fronts is the result. Description of legal facts becomes more objective, and legal criticism becomes more critical.[29]

Law as a Determinant of Human Behaviour

It is ancient wisdom that the human significance of law is found in the impact of law upon human behaviour. *Scire leges non hoc est verba earum tenere, sed vim et potestatem.*[30] Yet actual investigation of the effects of law upon conduct still has an air of novelty about it. One of the great protagonists of sociological jurisprudence, Professor Kantorowicz, puts the case in striking fashion. When the lawyer or law student reads a code of laws (or for that matter a legal treatise, a statute, or a collection of decisions),

> "Let him ask himself with respect to each statement . . . what harms would social life undergo if instead of this statement the opposite were enacted. And then let him turn to all textbooks, commentaries, monographs, and reports of decisions and see how many questions of this sort he will find answered and how many he will find even put."[31]

The problem of the effects of law upon human beings, which is central to legal science, is a problem which classical jurists of many schools have found it convenient to ignore. Ignoring this problem has been particularly easy in view of the hallowed legal conventions that everybody is presumed to know the law and that prudent men, the majority of mankind no doubt, obey the law. In that kind of world, all one needs to do in order to know the effects of a given rule is to read the rule and to appreciate its purpose.

Unfortunately, in the real world, most of us are vastly ignorant of the law, and are continually violating or disregarding the law. The question, then, of how much actual observance is given to any

[29] F. S. Cohen, "Transcendental Nonsense and the Functional Approach" (1935), 35 *Columbia Law Review*, 809, 838–841.
[30] *Dig.* 1.3.17 (Celsus).
[31] *Rechtswissenschaft und Sociologie* (1911), 8.

legal rule is an empirical question that cannot be answered on *a priori* grounds.

Again one turns to Professor Kantorowicz for a striking portrayal of the disdain of facts by traditional legal theory:

> "This fiction (that every one knows the whole law of a state) contradicts the facts in the grossest manner. The truth is that nobody knows the whole law in its unsurveyable compass, that a few people know a portion of it, that most know nothing of it. So true is this that if a private citizen has acquired a thorough knowledge of the law of the state he will usually belong to a class of shady gentlemen. The usurer, the criminal apprentice, the yellow journalist, the fraudulent promoter know the rules which interest them accurately enough; the wholesale merchant, the artist, the statesman, the husband have only a sporadic acquaintance with even the paragraphs of the sales, copyright, public, international, or family law, without being disturbed in their activities by this ignorance. The traveller in a foreign country makes himself familiar with the language, the history, the art, the customs of the people—not even in a dream does it occur to any one to so much as open its statute books."[32]

It is certain that law does not secure obedience except in so far as it is known. Thus an important problem in determining the human significance of any rule or law is the problem of discovering the extent to which people theoretically affected by the rule are actually aware of it. From the point of view of the legislator, the problem takes a special form: In order to make this or that legislation effective, how can knowledge of it be conveyed to those who are concerned, including those who are expected to enforce it? The influence of newspapers, public trials, law treatises, and other instruments of education or propaganda, upon popular legal beliefs presents a fascinating problem for the sociological jurist, and the results to be achieved in such investigations may prove of considerable practical value.

The functional approach suggests that instead of tracing the effects of a decision along celestial lines of logical force we may look rather to the actual process of learning, or understanding and misunderstanding, which governs the interpretation that will be put upon a statute or a decision by laymen, by administrative officers, and even by successive judges.

The existence of this empirical problem has been somewhat

[32] Kantorowicz (*sub pseud.* Gnaeus Flavius), *Der Kampf um die Rechtswissenschaft* (1906), 13–14.

obscured by the traditional notion that legal rules may be deduced from decisions and that these rules "bind" future judges. As a matter of fact, no number of decisions can logically provide a rule of law, for the simple reason that a universal proposition can never be validly inferred from any number of particular propositions. A decision is a particular proposition, and a rule of law is a universal proposition.

The search for a logical formula that will determine precisely what rule each decision implies[33] is a wild goose chase starting from a logical confusion. The functional approach substitutes a wholly empirical question: "What influence is a legal decision likely to have on future cases?" This is not always a simple question to answer, as competing counsel in most cases will recognise. There is a vocabulary and a technique for restricting decisions to the particular facts of the case, that is to say for distinguishing any new case and thus destroying the precedent value of the old case. There is another vocabulary and another technique for drawing wider and wider morals from a decision, and applying these morals to cases more and more distantly removed. In selecting and compromising between these techniques, courts make choices which cannot be blamed on logic. To describe these choices as they occur is the objective of a functional theory of legal precedents.[34]

The problem of interpreting past decisions is not a problem restricted to the field of judicial action. A similar problem exists in the field of public administration and in the field of popular legal opinion. Here again there is need of patient study to show how people actually do interpret and misinterpret laws and cases. The results of such study may make it easier for judges and legislators alike to foresee the consequences of action.

The study of mental reactions to rules and decisions, while essential, is not sufficient to determine their full effects. Beyond this task is the task of determining how the incentives to obedience and disobedience will mould reactions to law.

The scope of this latter task is underestimated by those who deny that law consists of commands and point out that most legal propositions, at least outside the field of criminal law, are declaratory rather than imperative. What this criticism overlooks is that legal propositions which are declaratory in form owe their legal force to threats of state action.

[33] For examples of this search see Goodhart, "Determining the *Ratio Decidendi* of a Case" (1930), 40 *Yale Law Journal*, 161.

[34] K. N. Llewellyn, *The Bramble Bush* (1930), 47, 61–66. Oliphant, "A Return to *Stare Decisis*" (1928), 6 *American Law School Review*, 215, 217, 218. F. S. Cohen, *Ethical Systems and Legal Ideals* (1933), 33–37.

> "An order does not cease to be a command because it contains an explanation of what it is that is commanded. Nor is a law permitting a man to do something at his option, e.g. to dispose of his property by testament, any less a part of the system of imperatives, in this case of what we call the law of property. It certainly is an imperative to the children or other heirs, who when the will is properly made, must yield certain goods to legatees or devisees."[35]

The human significance of any rule of law thus depends upon the extent to which it secures obedience. This, in turn, will depend upon the strength of the organised desire for which the rule provides an enforcing instrument, as compared with the strength of the organised desire which the rule is intended to frustrate. The failure to recognise this persistent struggle that underlies all law enforcement is written large in the history of social reform legislation. Again and again idealists have succeeded in writing their hopes on the statute books, only to discover in dismay that laws are not self-executing. Out of the past century's experience with social reform legislation certain elementary facts are beginning to emerge—for instance, that a law designed to help the weaker of two parties to a bargain will be useless if it is possible to "contract out," and that legislation designed to protect an oppressed class will not be effectively enforced unless it sets up some independent agency capable of representing the interests of that class in securing enforcement of the legislation.[36]

Every legal problem, viewed functionally, involves a conflict of interests. The stability of any solution will depend, at least in part, upon a correct appraisal of the desires that will be effectuated or frustrated by the solution.[37]

The problem of weighing incentives to obedience and disobedience leads finally to the problem of weighing social forces. What the law ought to accomplish in any given situation cannot be determined without determining what the law *can* accomplish. This latter question leads us inevitably to seek some measurement of the organised force that can be brought to bear on any legal issue. The force of law depends partly, to be sure, on the death-dealing equipment of the state; it depends also upon the essential human services which the state controls; it depends at the same time upon the organisational loyalties without which armies,

[35] M. R. Cohen, *Law and the Social Order* (1933), 206.

[36] See W. F. Dodd, *Administration of Workmen's Compensation* (1936), pp. 16–26, 70–99. Cf. E. A. Parry, *The Law and the Poor* (1914).

[37] See, for a significant application of this approach to the law of larceny, J. Hall, *Theft, Law and Society* (1935), chap. 6.

police forces, and all social institutions disintegrate. The effectiveness of the opposition to law, at any point in the legal order, will likewise be proportionate to the physical, economic, and emotional power which can be mustered to oppose a given objective affirmed by the law. Recent history in Italy, Germany, Austria, and Spain, reveals the tenuousness of traditional analyses of democracy in terms of constitutional rights and procedures. From a realistic point of view, democracy is gone when the theoretical power of the majority to govern ceases to correspond to an actual power to compel obedience. From this point of view the question of whether a democracy can tolerate vast concentrations of financial power assumes critical significance. In constitutional as well as in private law, the stuff of which living law is made is not concepts in logical arrangement but conflicting interests diversely organised and pitted against each other in an ever shifting battle line. A realistic appraisal of the human meaning of any legal rule involves us in a measurement of human desires and human powers in every domain of life.

The question of the proper scope of law has been argued back and forth for a good many centuries, and nearly all of the argument has been in *a priori* terms. From the functional standpoint, the problem takes a form in which empirical evidence becomes relevant. The central question is that of the effectiveness of various possible legal rules and arrangements. From this standpoint, if modern history shows a progress of the law in social control it is significant to ask whether this progress is not primarily ascribable to an increase in the realm of jurisdiction dominated by the state through its increased physical force rather than to any progress in legal wisdom or the moral qualities of humanity. In the modern centralised nation the monopoly of internal power by the sovereign, based upon centralising developments in the technology of industry, communication, and warfare, has made it possible to exercise effective legal control over many relationships that were once outside the realm of effective control. If legal development has not made full use of new opportunities, this is partly due to the heritage of thinking from an age in which the state could not undertake certain tasks of social control for lack of power, and in which it accordingly became the accepted duty of the moralist to prove that those things were not worth doing. A state which cannot secure obedience from those who control its industry may at least save face by issuing the unbreakable commandment, "Do as you please."[38] Unfortunately, the

[38] Cf. F. S. Cohen, "The Socialisation of Morality," in Hook and Kallen, *American Philosophy To-day and To-morrow* (1935), 83, 87.

fact tends to be viewed as an ideal. In political theory, at least, conservatism may be defined as the idealization of yesterday's misfortunes.

If the temporal variation of state power offers a useful key to the understanding of legal history, the varying degrees of state power in different fields of human conduct offer an equally useful key to the understanding of the law of a given epoch. The law is one among many "control" institutions. The direction of its powers is largely determined by a process of competition with organised religion, organised education, the family, professional and mercantile agencies of control, and various other social institutions, each with its own "inner order" and its own sanctions.[39] The disruption of any of these agencies throws new tasks upon the law; their development relieves the legal order of old responsibilities.

In this competition with other organisations of social force, the law realises the limitations of its machinery. Operating through courts, it is required by dictates of social economy to concentrate its attention upon facts readily verifiable. Laws against adultery are notoriously unenforceable. The fact that land cannot be concealed gives point to the peculiarly rich development of legal control over real property. The public events of birth, marriage, and death furnish stable fulcrums for legal leverage. The organisation of men into permanent groups offers new pressure points for the activity of the law.[40]

To describe law-in-action is to describe the inter-relationships between judicial decisions and all the other events of the social scene. The meaning of law depends not only upon the factors already noted, which determine how far it will be observed, but on all the social facts that give law-observance and law-breaking their human significance. In writing the life-history of a legal rule one does not reach the end of the story when the rule is obeyed or disobeyed. There remains to be told the meaning of obedience or disobedience, in terms of social institutions and customs, in terms of the material things over which law gives control, in terms of human habits, modes of thought, fears, hopes, pleasures and pains.[41]

The problems raised in the search for the human meaning of legal rules, decisions, concepts and institutions are problems to which the literature of functional jurisprudence gives, perhaps, only faltering and partial answers. To have lifted these problems

[39] See Ehrlich, *Fundamental Principles of the Sociology of Law* (translated by Moll; 1936), chaps. 2–3.
[40] F. S. Cohen, *Ethical Systems and Legal Ideals*, 269, 270.
[41] *Ibid.*, 271–285.

to the level of conscious formulation is itself an achievement. What remains is for the future.

A functional jurisprudence, in facing this task of tracing the human significance of law, will draw upon the results of scientific study in many related fields. Already first attempts have been made to trace the human consequences of specific rules and decisions.[42] There is a growing literature that analyses, from the legal standpoint, the fields of conduct to which law is applied.[43] More important, perhaps, than any of these published studies is the incorporation of social investigation into the process of law administration. The growing practice of including economic materials in legal briefs, the increased use of economists and statisticians by administrative bodies, and of psychiatrists and social workers by courts, the growing utilisation of social research in legislative hearings and investigations, all testify to the contemporary significance of the functional approach and its promise for the future.

Function and Value

The normative use of definitions is one of the most prevalent sources of confusion in legal criticism.

Those who define law as an outpouring of the *Volksgeist* are prone to argue that law which shows their theory to be false, e.g. code law, is undesirable. Those who define law as the will of the sovereign are apt to conclude that judge-made rules which ignore or defy the will of the sovereign are bad law. Those who define law as a body of authoritative principles recognised by the courts are likely to condemn as evil any course of judicial decisions that violates these assumed principles.[44]

It is one of the serious dangers of the functional approach that those who invoke it for the purpose of description may without

[42] See, for instance: McCracken, *Strike Injunctions in the New South* (1931).

[43] In addition to the vast modern literature on criminology, there is a growing corpus of legally oriented material on such subjects as corporate practice, banking practice, the organisation and functioning of trade unions, the disposition of decedents' estates, industrial accidents, automobile accidents, contracts of employment, and the psychology of the witness.

[44] Bertrand Russell points to a similar fallacy in the realm of philosophy:

"The philosopher first invents a false theory as to the nature of things, and then deduces that wicked actions are those which show that his theory is false. To begin with the traditional Christian: he argues that, since everything always obeys the will of God, wickedness consists in disobedience to the will of God. We then come on to the Hegelian, who argues that the universe consists of parts which harmonise in a perfect organism, and therefore wickedness consists of behaviour which diminishes the harmony—though it is difficult to see how such behaviour is possible, since complete harmony is metaphysically necessary. . . . These examples have, I hope, made it plain that a metaphysic can never have ethical consequences except in virtue of its falsehood; if it were true, the acts which it defines as sin would be impossible." *Sceptical Essays* (1928), ch. 7 ("Behaviourism and Values"), p. 91.

further thought utilise it as a criterion of value. It is important for the jurist to remember that when he has described the human significance of a rule he has not thereby justified its existence. The task of valuation remains to be faced.

Caution against normative use of a functional definition of law is particularly pertinent because of the ambiguity of the word "function." When one says, for instance, that it is the function of the judge to apply pre-existing law to the facts of a case, one may mean that this is what a judge *ought* to do or simply that this is what judges *actually* do. A statement of the latter type is purely descriptive. A statement of the former type assumes a standard of values, and is, in effect, an ethical judgment.

It is to be emphasised that functional analysis of a legal rule or decision is purely a descriptive process. On the other hand, an intelligent value judgment upon any legal rule or decision presupposes such descriptive functional analysis, but also involves an ethical premise.

It was Bentham's great and enduring contribution to legal criticism to insist that the value of a legal rule depends upon its human consequences. In the field of legal criticism, or normative jurisprudence, functionalism is simply a development of utilitarianism. It is a development, however, which seeks to overcome certain weaknesses in the philosophy and method of Bentham and his immediate successors.

In the first place, Bentham failed to distinguish between his general theory of value, i.e. that the value of any act depends upon its consequences, and his theory of the good, i.e. that pleasure or happiness is the only good. The latter theory is one that many reasonable people reject, and although I happen to believe that all the objections thus far levelled against Bentham's hedonism are inconclusive,[45] I should agree that one may adopt alternative standards of ultimate value without getting into logical self-contradiction.

But no matter what other standards of value one may adopt, the essential basis of utilitarianism remains.[46]

Bentham's doctrine that the value of any legal rule depends upon its consequences was met with the philosophical challenge: Why should we assume that the value of anything depends upon its consequences? Functionalism exposes the emptiness of this challenge, by showing that the distinction between law and its consequences is purely arbitrary. The meaning of a legal rule is

[45] F. S. Cohen, *Ethical Systems and Legal Ideals* (1933), pp. 185–220.

[46] This is recognised by so vigorous a critic of hedonism as G. E. Moore. *Ethics* (1912), chaps. 1–3; *Principia Ethica* (1903), chaps. 1–2.

not action commanded but action caused. One cannot evaluate a legal rule or institution intelligently without knowing the action caused which constitutes the human meaning of the rule or institution. The challenge to Bentham's general theory of value turns out to be only a verbal confusion.

A further weakness in Bentham's utilitarianism springs from the general state of the social sciences at the time Bentham wrote. While insisting that the value of law depends upon the effect of law on human conduct, Bentham himself was unable to utilise any scientific study of such effects, for the simple reason that no scientific study of such effects had ever been made. The bare materials for such a study—judicial statistics, general social statistics, and social case studies—were lacking. Bentham therefore had to rely entirely upon common observation in making his own calculations of the effects of various legal rules and institutions. To-day jurisprudence can draw upon a wealth of material, scientifically collected and organised, in tracing the effects of law in human society.

In the field of legal criticism the functional method may thus be conceived as essentially a reorientation of utilitarianism to a wider philosophical perspective and to a broader horizon of relevant knowledge in the fields of psychology, economics, criminology, and general sociology.

Felix S. Cohen*

* Assistant Solicitor, U.S. Interior Department, Washington, D.C.

A SCALE OF VALUES IN THE COMMON LAW

OF the Common Law of England it may in truth be said that it contains a noble conception of man and a noble conception of law: of man as a reasonable being and of law as a reasonable rule. The reasonable man of the law is naturally also a freeman. Freedom in the conception of the Common Law is a thing native to man as man. "Libertas est naturalis facultas ejus quod cuique facere libet nisi quod jure aut vi prohibetur. Sed secundum hoc videtur quod servi sint liberi, nam et ipsi liberam habent facultatem nisi vi aut jure prohibeantur."[1]

This conception of man as by nature a free and reasonable being gave rise to the notion of the *liber et legalis homo*, the free and lawful man of the English Law. "Among laymen the time has indeed already come when men of one sort, free and lawful men, can be treated as men of the common, the ordinary, we may perhaps say the normal sort, while men of all other sorts enjoy privileges or are subject to disabilities which can be called exceptional."[2] "The growth of the Common Law was unfavourable to the existence of a class of slaves"[3] or unfree citizens. In course of time the Courts of Common Law lumped together all the classes of unfree tenants under the comprehensive term *villani*.[4] Hengham's *Parva* shows the growth of the bias in favour of the personal freedom of the villein.[5] "The Common Law must in the interests of the State and in obedience to its own principles hold the villein to be a free and lawful man."[6] By the beginning of the reign of Elizabeth the process was complete and the Common Law had established all men in the status of freedom.[7] The free and lawful man in whose image the English citizen was thus made was conceived to be a reasonable man, innocent of crime and

[1] Bracton, Ed. *Woodbine*, vol. ii, pp. 29–30. The passage continues: "in hac parte jus civile vel gentium detrahit juri naturali."

[2] Pollock and Maitland, *History of English Law*, vol. i, 407.

[3] Holdsworth, *History of English Law*, ii, 202: "At the end of the Anglo-Saxon period praedial serfs comprised most of the humble cultivators of the soil." Holdsworth, ii, 42.

[4] Holdsworth, *op. cit.* iii, 199–208.

[5] *Ib.* ii, 264.

[6] *Ib.* iii, 500, cf. iii, 457: "The very idea of a normal person is the creation of a common law which has strengthened the bonds of society by administering an equal justice to all its members."

[7] See Hargraves' argument in *Sommersett's Case:* Broom's *Constitutional Law*, Ed. 1866, pp. 65–105. In *Cartwright's Case*, 11 Eliz. (Rushworth, ii, 468), it was resolved that England was "too pure an air for a slave to breathe in."

wrong-doing,[8] honest in his dealings,[9] efficient in his work,[10] of good repute among his neighbours,[11] a man of firmness and courage[12] animated by a spirit of friendship for his fellowmen.[13] The whole tendency and operation of the Common Law with this concept of the free and lawful man was to raise all men to the level of economic and political freedom.[14] Every adult citizen was (or became) a *persona*.[15] In contradistinction to the slave[16] (who was

[8] "De quolibet homine presumitur quod sit bonus homo donec probatur in contrarium." Bracton f, 193a. In the manifesto of Jack Cade (1450) we read: "Item we wyll that all men knowe we blame not all the lordys, ne all tho that is about ye kyngs person ne all jentillmen ne yomen ne all men of lawe ne all bysshopes ne all prestys but all such as may be founde gylty by just and trewe enquery and by the lawe." Cf. The presumption of Innocence: *Williams* v. *East India Co.* (1802), 3 East 192; *Rutherford* v. *Richardson*, [1923] A.C. 1; the presumption of Legitimacy: *Banbury Peerage Case* (1811), 1 Sim. & St. 153; *Russell* v. *Russell*, [1924] A.C. 687; the presumption of Regularity: *Berryman* v. *Wise* (1791), 4 T.R. 366; the presumption of Lawful Origin: *Johnson* v. *Barnes* (1873), L.R. 8 C.P. 527. The word of Fortescue, C.J., is well-known: "I would rather wish twentie evill doers to escape death through pitie than one man to be unjustly condemned."

[9] The onus of proof is always on a person alleging fraud or (save in exceptional instances) undue influence. Again, good faith and absence of malice are presumed in favour of one who defames another on a privileged occasion: Gatley on *Libel*, 2nd ed., 744; and cases cited.

[10] The onus of proving that materials supplied are inferior or that work done is inefficient is on the person making the allegation.

[11] Words that are defamatory are presumed to have been published "falsely and maliciously" of a plaintiff: Gatley on *Libel*, 2nd ed., p. 647. In this case the presumption of good character and repute on the part of the plaintiff displaces the presumption of innocence on the part of the defendant.

[12] Cp. *R.* v. *Vincent* (1920), 9 C.A.R. 91; *O'Kelley* v. *Harvey* (1882), 15 Cox C.C. 435; Dicey, *Law of the Constitution*, 8th ed. 501, cf. *Haynes* v. *Harwood*, [1935] 1 K.B. per Greer, L.J., at p. 158; per Maugham, L.J., at p. 162.

[13] *Contra*: the *homo homini lupus* of Ovid and of Hobbes. The point is of immense political and legal importance: cf. the cases on Rescue, *infra*. The doctrine is to be found in Cicero: "By nature we are disposed to love men; this is the foundation of law": *de Leg.* i, 15, 43; in Seneca: "Man is born to mutual service: to the service of the Common Good": *de Clementia* i, 3, 2; in Augustine: "Sociale quidem est natura humana magnumque habet et naturale bonum vim quoque amicitiae": *de Bono Conjugale*; in Aquinas: "Est autem omnibus hominibus naturale ut se invicem diligant; cujus signum est quod, quodam naturali instinctu, homo cuilibet homini etiam ignoto subvenit in necessitate . . . ac si omnis homo omni homini esset familiaris et amicus." *Contra Gentes*, iii, Ch. 117. In More's *Utopia*: "No man ought to be counted an enemy who hath done no injury. The fellowship of nature is a strong league; and men be better and more surely knit together in friendship and benevolence than by leagues and covenants, by hearty affection of mind than by words." Thomas More had in his time been Reader at Lincoln's Inn, and was here reproducing the doctrine of the Common Law: "Common Law is common reason and common reason bids one trust another." Holdsworth, *H.E.L.* ii, 595; cp. iv, 410. The validity of this view of human nature is affirmed by leading anthropologists, see Professor Elliot Smith: *On Human History*, 180–191; see also two notable letters to *The Times*, dated respectively the 13th Nov., 1928, and the 15th Nov., 1929, from the same authority.

[14] The political ideas of the Common Law became the constitutional law of the English State and formed the political theory of Englishmen. Holdsworth, *H.E.L.*, iv, 288.

[15] "Persona" was defined in the technical language of the philosophers, *individua substantia rationalis naturae*.

[16] Cf. Bulgarus: "Servi enim jure civili *nullam personam* habent; ideo nuptias quae juris civilis sunt non contrahunt." Cp. Azo: "Quantum ad jus civile servus *pro mortuo* habetur"; cited Carlyle, *Medieval Political Theory*, vol. ii, p. 36.

not a *persona* and who enjoyed neither the *jus connubii* nor the *jus commercii*) the free man is entitled to make a lawful marriage[17] and to own property.[18] And the ability and the right to own property involves the ability and the right to alienate property.[19] The principle of freedom of alienation was a principle of the common law.[20] A restraint on alienation in the case of a chattel, says Coke in astonishment and indignation, "would be against trade and traffic and bargaining and contracting between man and man."[21]

For alienations and contracts at Common Law an exercise of free will was essential.[22] In certain cases, e.g. on a conveyance by a married woman by way of fine, the law made a special investigation to ascertain that the conveyance was freely willed. "The examination must be solely and secretly and the effect thereof is whether she be content of her own free good will without any menace or threat to levy a fine of these parcels."[23] In *Johnson* v. *Clark*[24] Parker, J., declared that a local custom under which real estate held by a married woman could be disposed of by her with the consent of her husband *without her separate examination or acknowledgment* was inconsistent with the general principle of the common law that *an exercise of free will was essential to alienations and contracts* and that a married woman (without such examination and acknowledgment) was presumed not to be in a position to exercise that free will; and the custom was therefore unreasonable and bad.

The principle that an exercise of free will is essential to alienations and contracts at Common Law explains not only the special rule as to the separate examination of married women but also the general rules which strike at the legal validity of a contract made

[17] And to marry *per verba de presenti*, by a "formless interchange of words" without the presence of an "ordained clergyman": see Pollock and Maitland, *History of English Law II*, 373-4. It was an English Pope who laid down the rule expressly that inasmuch as in Christ there is neither free nor slave, and the sacraments are open to all, so also marriage (which is a sacrament) must not be prohibited to slaves; see Carlyle, *Med. Pol. Theory*, ii, 132.

[18] "Sic habet homo naturale dominium exteriorum rerum quia *per rationem et voluntatem* potest uti rebus exterioribus ad suam utilitatem quasi proper se factis": Aquinas, *de Justitia* Q. 66, Art. 1. It is to be observed that in England and elsewhere the institution of marriage and the institution of property arose spontaneously and were not called into being by any royal decree or any Statute of Parliament or any canon of the Church.

[19] Cf. Gaius. *Dig.* xii, 1, 3: "Nihil enim tam conveniens est naturali aequitati quam voluntatem domini volentis rem suam in alium transferre ratam haberi."

[20] Holdsworth, *H.E.L.*, iii, 85; cf. ii, 349; iv, 350, cf. 318.

[21] Coke, Litt. 223a. Cf. Knight, *Grotius*, p. 105.

[22] See the illuminating judgment of Parker, J., in *Johnson* v. *Clark*, [1908] 1 Ch. 303. Cf. Plowden: "Every deed imports consideration, viz. the *will* of him who made it," cited Holdsworth, *H.E.L.* iii, 419, note 5.

[23] Co. 2nd Inst., 515.

[24] *Ubi sup.*

or act done under physical duress,[25] or under "undue influence" constraining the will; or under the influence of fraud[26] or mistake.[27]

On the other hand it is a general principle of the Common Law that an act done freely with a full knowledge of the circumstances is irrevocable in law.[28] Again, an act or a risk voluntarily suffered or accepted is irremediable in law.[29] The doctrine embodied in the maxim *volenti non fit injuria* is thus part of the Common Law.[30] But *the Common Law* did not hold a man liable for the acts of another (even of his servant) which he had not antecedently authorised or commanded or subsequently (with full knowledge of the circumstances) ratified. "It would be against all reason," said Counsel in Y.B. Henry IV, "to impute blame or default to a man where he has none in him, for the carelessness of his servants cannot be said to be *his act.*"[31]

[25] Cf. 1 Hale, P.C., 433: "If there be an actual forcing of a man as if A by force take the arm of B and the weapon in his hand and therewith stabs C whereof he dies, this is murder in A but B is not guilty." Cf. *R.* v. *McGrowther* (18 How. St. Tr. 391). A technical distinction was thus drawn between *actus hominis* and *actus humanus*: a fully human, that is, a voluntary act.

[26] Where it is necessary to show that the act which it is sought to avoid was actually induced by a false statement or representation made with intent to induce that act.

[27] Cf. 1 Hale, P.C.42; Semble, on the principle *Nihil volitum nisi praecognitum.* See e.g. *Jones* v. *Waring*, [1926] A.C. per Lord Sumner at p. 696; per Lord Shaw at p. 690. And see *Norwich Union* v. *Price*, [1934] A.C. *per* Lord Wright at p. 462. An error in the mind as to the "essence" or "substance" of the act in contemplation makes void the consequent of the will. The error must go to "substance" or "essence" not "quality' or "accident" merely: *Lever* v. *Bell*, [1932] A.C. 161. The law here returns to its bases in logic and metaphysics.

[28] See e.g. the cases on "voluntary payment": *Remfrey* v. *Butler* (1858), E.B. & E. at p. 897.

[29] See e.g. *Smith* v. *Baker*, [1891] A.C. 325.

[30] Cf. however, *Smith* v. *Baker* (*ubi sup.*) *per* Lord Watson, at p. 355: "The maxim volenti non fit injuria . . . has lost much of its literal significance." The philosophic basis of the principle is thus given by Aquinas: *de Justitia.* Qu. 59, Art. 3. "Actio de sua ratione procedit ab agente; passio autem, secundum propriam rationem, est ab alio: unde non potest esse idem, secundum idem, agens et patiens (3 cap. 1 and 8 cap. 5 Physics). Principium autem proprium agendi in hominibus est voluntas. Et ideo illud proprie et per se homo facit quod volens facit: et e contrario illud proprie homo patitur quod praeter voluntatem suam patitur; quia in quantum est volens, principium est ex ipso, et ideo in quantum est hujusmodi magis est agens quam patiens. Dicendum est ergo quod injustum per se et formaliter loquendo nullus potest facere nisi volens nec pati nisi nolens."

[31] Cited Holdsworth, *H.E.L.*, iii, 383. The modern principle of employers' liability is a departure from the principle of the Common Law: see Holdsworth, *ib.* 387. "The real difficulty was to make out how any man, any natural man, could be vicariously liable to pay damages for the wrongful act or neglect of his servant which he had in no way authorised and might even have expressly forbidden": Pollock, *L.Q.R.* xxvii, 235. "The liability of an employer to the public for injuries caused by the acts and defaults of his servants is analogous to the duties imposed with various degrees of stringency *on the owners of things which are or may be sources of danger* to others." Pollock, *Essays on Ethics and Jurisprudence*, 128, cited Holdsworth, *H.E.L.*, viii, 479. The reason for the change in principle is said to be economic: "Should we nowadays hold masters answerable for uncommanded torts of their servants if normally servants were able to pay for the damage that they do? We do not answer the question: for no law . . . has ever been able to ignore the economic stratification of society while the existence of large classes of men 'from whom no right can be had' has raised

In line with this principle (and perhaps a part of it) is the rule that liability for a wrongful act terminates on or at the intervention of a new act of will: *novus actus* (*humanus*) *interveniens. Liber est causa sui.* The free act of B is the cause of the consequences that flow from it and these consequences cannot ordinarily be laid to the charge of an earlier agent A.[32]

The Common Law thus sets the highest value on its own great creation, *the liber et legalis homo*, "the reasonable man of the law," and on his free act of will.

It protects his life and bodily integrity by criminal sanctions. Save in defence of his own life against unlawful attack,[33] no private citizen may take the life of another even to save his own.[34] Again to take one's own life or to attempt to do so is a criminal act.[35] And, for all the value that the Common Law sets upon the free will of the citizen, it refuses to admit the plea of *consent* as an answer to a charge of unlawful violence causing or intended to cause hurt or injury calculated to interfere with health or comfort.[36] On the same ultimate ground of public utility and public welfare is founded the rule that "the law of England will not permit any man to enslave himself by contract";[37] and the

difficult problems for politics and jurisprudence ever since the days of Athelstan. . . . However, our Common Law when it took shape in Edward I's day did not unless we are much misled make masters pay for acts that they had not commanded nor ratified. Had it done so, it would have punished a man for an offence in which he had no part." Pollock and Maitland, *Hist.* ii, 533, cf. Holdsworth, *H.E.L.* iii, 387. So also, the act of an insane person as such is not in law *his act*: *Felstead* v. *Director of Public Prosecutions*, [1914] A.C. 534.

[32] Unless such consequences were intended or were the *natural* and probable result of the act of A. See, e.g. *Speight* v. *Gosnay* (1891), 60 L.J.Q.B. *per* Lopes, L.J., at p. 232. At this point the concept that the law has of the *nature* of man becomes of high importance. See the Rescue cases: *Brandon* v. *Osborne Garrett*, [1924] 1 K.B. 548; *The Paludina*, [1927] A.C. 16; *Cutler* v. *United Dairies*, [1933] 2 K.B.297 C.A.; *Haynes* v. *Harwood*, [1934] 2 K.B. 240; [1935] 1 K.B. 146.

[33] Or his own house: *R.* v. *Hussey* (1924), 18 C.A.R. 160. This rule which sacrifices life to property would seem to be out of symmetry with the developed Common Law. The death penalty is no longer inflicted for theft or burglary.

[34] *R.* v. *Dudley and Stephens* (1884), 14 Q.B.D. 273.

[35] Hale, P.C. 412. *R.* v. *Mann*, [1914] 2 K.B. at p. 108, cf. *Beresford* v. *Royal Insurance Co.* (1937), 53 T.L.R. 583. The medieval condemnation of suicide was based in part on social principles: "Quaelibet pars id quod est, est totius. Quilibet autem homo est pars communitatis: et ita id quod est, est communitatis. Unde in hoc quod seipsum interfecit, injuriam communitati facit." Cp. Aristotle. 5 *Ethics*. Aquinas, *de Justitia*, Q. 64, Art. 5.

[36] *R.* v. *Donovan*, [1934] 2 K.B. 498. "No person can licence another to commit a crime." An exception is made in the case of certain many diversions which "may fit people for defence" and other lawful sports and pastimes; and in the case of surgical operations, lawfully performed: "Si vero membrum propter putredinem sit totius corporis corruptivum, tunc licitum est, de voluntate ejus cujus est membrum, purtridum membrum praescindere propter salutem totius corporis: quia unicuique commissa est cura propriae salutis. Aliter autem aliquem membro mutilare non est licitum alicui privatae personae, etiam volente illo cujus est membrum: quia per hoc fit injuria communitati, cujus est ipse homo et omnes partes ejus"; *ib.*, *de Justitia*, Q 65, Art. 1.

[37] Broom, *Constitutional Law:* Ed. 1866, p. 91, cf. *Harwood* v. *Millars*, [1916] 2 K.B. 44; *McEllistrum* v. *Ballymacelligot*, [1919] A.C. 548.

rule that a contract in restraint of trade is bad and unenforceable if it be not reasonable in reference to the interests of the parties and reasonable also in reference to the interests of the public. The State has an interest not only in the life and bodily integrity but also in the powers and activities of its members.[38]

The solicitude of the law for life and bodily welfare extends even to life in its sources: to children *en ventre leur mere*.[39] Attempts to procure abortion and child destruction[40] are offences punishable with penal servitude for life.[41]

A like concern for the life and bodily welfare of the citizen runs through the civil as distinguished from the criminal law. Thus, life is ordinarily or always preferred to property and conduct. It is always justifiable to make away with property in order to save life.[42] And it has always been an accepted principle in marine insurance that a ship may deviate in order to save life though the same liberty does not extend to deviation in order to save property. In the well-known case of *Scaramanga* v. *Stamp*,[43] Brett, L.J., stated during the argument that "it is contrary to public policy that a ship should *not* deviate in order to save life: *for a vessel to go out of her course with that object is not a violation of the contract that she shall proceed direct* to the port for which she is bound." In the judgment which was delivered by Cockburn, C.J., with the concurrence of Brett and Cotton, L.JJ. the Common Law of England in relation to this matter was stated to be in accordance with the law of the United States of America:

"Deviation for the purpose of saving life is protected and involves neither forfeiture of insurance nor liability to the goods owner in respect of loss which would otherwise be within the exception of 'perils of the seas.' And, as a necessary consequence of the foregoing, deviation for the purpose of communicating with a ship in distress is allowable inasmuch as the state of the vessel in distress may involve danger to life. On

[38] *Nordenfelt* v. *Maxim Nordenfelt Gun Co.*, [1894] A.C. 535; 565. "All interference with individual liberty of action in trading and all restraints of trade themselves if there is nothing more are contrary to public policy and therefore void."

[39] See *R.* v. *Poulton* (1832), 5 C. & P. 329; 1 Hale, 433.

[40] 19 & 20 Geo. 5, c. 34. Child destruction is the wilful destruction of the life of a child capable of being born alive before it has an existence independent of its mother.

[41] The interest of the state in the integrity of the family (which is the source of its own life)is not emphasised in English law which provides no direct sanction for adultery. The recent book by Lord Merrivale, *Marriage and Divorce*, would seem to favour the introduction of a criminal sanction.

[42] *Mouse's Case* (1608), 12 Rep. 63. "There is in this respect a wide distinction between life and property," per Bramwell, L.J., in 5 C.P.D., at p. 296.

[43] (1880), 5 C.P.D., at p. 298.

the other hand *deviation for the sole purpose of saving property is not thus privileged* but entails all the usual consequences of deviation."[44]

The principle illustrated in the case of *Scaramanga* v. *Stamp* is "not confined to cases of maritime perils,"[45] and was extended by the Court of Appeal in *Haynes* v. *Harwood*[46] to a case in which a policeman sustained serious hurt in an attempt to stop a pair of runaway horses and a van which threatened injury to life and limb of persons using the highway. The earlier case of *Cutler* v. *United Dairies Ltd.*[47] (also a decision of the Court of Appeal) was distinguished on the ground that in *Cutler's* case the "rescue" had been attempted not on the King's highway where danger was threatened to life and limb but in a field where the runaway horse had come to rest and where nobody was in danger. Notwithstanding certain *dicta* which seem to draw a distinction in such cases between "instinctive" and "deliberate" action[48] and notwithstanding a certain emphasis which was laid (in the Court of First Instance and in the Court of Appeal) in *Haynes* v. *Harwood*[49] on the special duties towards the public that attach to the office of a police constable, it may now (it is conceived) be taken to be a rule of English Law that the doctrine of *volenti* or voluntary assumption of risk "does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death whether the person endangered is one to whom he owes a duty of protection, as a member of his family or is a mere stranger to whom he

[44] 5 C.P.D., at p. 304. In a later passage of the judgment it is said: "The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity. . . To all who have to trust themselves to the sea, it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences which may result to a ship or cargo from the rendering of the needed aid. . . . Goods owners and insurers must be taken . . . as acquiescing in the universal practice of the maritime world prompted as it is by the inherent instinct of human nature and founded on the common interest of all who are exposed to the perils of the seas." The *normal* effect of deviation is to sweep aside the whole of the special contract in the charterparty or the bill of lading and to put the shipowner (at the best) in the position of a common carrier: *Thorley* v. *Orchis S.S. Co.*, [1907] 1 K.B. 660, 669; *International Guano Co.* v. *McAndrew*, [1909] 2 K.B. 360. And see *Kish* v. *Taylor*, [1912] A.C. 604, at p. 621. Cf. 14–15. Geo. v. c. 22, Sched. Art. iv (2) (l.)

[45] *Haynes* v. *Harwood*, [1935] 1 K.B. 146 C.A., per Maugham, L.J., at p. 165.

[46] *Ubi sup.*

[47] [1933] 2 K.B. 297, C.A.

[48] See e.g. *Brandon* v. *Osborne Garrett*, [1924] 1 K.B., at p. 541; *The Paludina*, [1927] A.C. per Lord Sumner, at pp. 26–30; and compare *Haynes* v. *Harwood, ubi sup* per Greer, L.J., at p. 159; per Maugham, L.J., at p. 164.

[49] *Ubi sup.*

owes no such special duty."[50] "The law does not think so meanly of mankind as to hold it otherwise than a natural and probable consequence of a helpless person being put in danger, that some able-bodied person should expose himself to the same danger to effect a rescue."[51] The "reasonable man of the law" is expected in such circumstances to show himself a man of energy and courage.[52] The doctrine (it will be observed) is limited to rescue in cases of danger to life or limb or bodily welfare. The "reasonable man of the law" will not expose himself to the same danger to save property as he will to save life. The distinction is clearly made in the American cases.[53]

This recognition of the value which attaches to life and limb and bodily welfare appears and reappears in many places in the law. Thus, *at Common Law* a master employing a servant in work of a dangerous character was under an implied obligation to take all reasonable precautions for the workman's safety; and was responsible not only for failure to provide good and sufficient apparatus, but also for failure to see that the apparatus was properly used.[54] Again, a master may not lawfully order a servant to go into or to continue in a position which involves danger to life or limb or bodily welfare; and a servant who disobeys such an order may not lawfully be dismissed.[55] Moreover, a contract for personal services is regularly subject to an implied condition rendering it unenforceable in law if its performance is found to involve serious risk to life or health.[56] In like manner, in every contract of carriage by sea the law implied an undertaking (which amounts to a *condition*) by the shipowner that the ship shall at the time of sailing be in fact seaworthy for the particular voyage

[50] This statement of the American rule (see *Eckert's Case*, 43 N.Y. 502) by Professor Goodhart in vol. 5 of the *Cambridge Law Journal* at p. 196, was expressly adopted in *Haynes* v. *Harwood* (*ubi sup.* at p. 157) by Greer, L.J., and said to be an accurate statement of the law of England. The doctrine is otherwise stated: "one is not guilty of contributory negligence in exposing oneself to danger of injury in order to rescue another from imminent danger of personal injury or death if under the same or similar circumstances an ordinary prudent person might have so exposed himself or . . . if the act of intervention was not performed under such circumstances as would make it rash or reckless in the judgment of ordinary prudent persons."

[51] Pollock on *Torts*, 13th ed., p. 498.

[52] *Haynes* v. *Harwood*, [1935] 1 K.B. 146, per Maugham, L.J., at p. 162.

[53] See Professor Goodhart in 5 *Cambridge Law Journal*, at p. 198.

[54] *Per* Lord Watson in *Smith* v. *Baker*, [1891] A.C. 325, at p. 353; and cases cited.

[55] *Turner* v. *Mason* (1846), 14 M. & W. 112, 118; *Ottoman Bank* v. *Chakarian*, [1930] A.C. 277; cf. *Bouzourou* v. *Ottoman Bank*, [1930] A.C. 271.

[56] See the decision of Atkin, J. (as he then was), in *London Theatre of Varieties Ltd.* v. *Evans*. *Times* newspaper, 15th, 16th, 19th May, 1914. The argument of Schiller, K.C., in this case is instructive. And see Isaacs on *Theatres and Music Halls*, pp. 205, 233.

and for the cargo carried.[57] And, on a letting of furnished premises for present occupation, the law implies a condition that the house "shall be in a condition and reasonably fit for human occupation . . . and where such a house is in such a condition that there is either great discomfort or danger to health in entering and dwelling in it, the intending tenant is entitled to repudiate the contract."[58]

In the field of tort also, the ultimate origin of the rule which may now be called the rule in *Donoghue* v. *Stevenson*[59] is to be found in the care which the Common Law has of life and limb. Thus, in *Thomas* v. *Winchester*[60] it was held, distinguishing *Winterbotham* v. *Wright*,[61] that a manufacturer of medicine had a duty to third parties irrespective of contracts to label his products carefully. The liability was imposed because "his negligence put human life in danger." Again, in *Macpherson* v. *Buick*,[62] it was laid down that "if the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser and used without new tests then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."[63]

It would seem to be reasonably clear that the Common Law recognises and affirms a certain scale of values that order themselves in a kind of hierarchy: contract,[64] conveyance, property,

[57] *Stanton* v. *Richardson* (1874), 33 L.T. 193; *The Glenfruin* (1885), 52 L.T. 769. Cf. *Turner* v. *Owen* (1862), 3 F & F 176. cf. 14 & 15 Geo. 5. c. 22, Sched. Art III. i (a).

[58] *Wilson* v. *Finch Hatton* (1877), 2 Ex. D, per Kelly C.B. at p. 343.

[59] [1932] A.C. 562; see especially per Lord Atkin, at pp. 580–583. Cf. Carlyle, *Med. Pol. Theory*, ii, p. 180, cf. ii, 106, 165.

[60] (1852), 6 N.Y. 397.

[61] (1842), 10 M. & W. 109.

[62] (1916), 217 N.Y. 382. In *Donoghue* v. *Stevenson*, *ubi sup*, at p. 598. Lord Atkin refers to the illuminating judgment of Cardozo, J., in *Macpherson* v. *Buick*, "in which he states the principles of the law as I should desire to state them."

[63] Cf. *Oliver* v. *Saddler*, [1929] A.C. 584 per Lord Dunedin, at p. 599. Other American cases exhibit the same solicitude for life and bodily welfare: cp. the "Good Samaritan" doctrine: A ship owes a legal duty to use due diligence to save a member of the crew who by his own neglect falls into the sea: *Harris* v. *Pennsylvania* (1931), 50 Fed. (2d) 866; Again, a seaman who becomes sick or is injured in the service of the ship is entitled to reasonably proper care: *The Iriquois* (1904), 194 U.S. 240.

[64] It is manifest that a contract which does not amount to a conveyance (e.g. a "bargain and sale") is inferior to conveyance and to property in legal rank and value. The Common Law had no doctrine of specific performance. On the other hand it gave an action in certain cases in *detinet* for what is now only a contract *debet*.

bodily well-being and integrity (the sources of life),[65] and the life of the free citizen.

Where, in this scale of values, shall we put honour and reputation? One may perhaps find guidance in some lines of Shakespeare:

> Who steals my purse steals trash,
> But he who filches from me my fair name
> Steals that which not enriches him,
> And makes me poor indeed.

Personal reputation is more precious and more intimate than property in external things. The law of defamation guards more jealously a man's right to his reputation than his title to goods.[66] Again, a right of action for damages for libel cannot be assigned.[67] And a bankrupt can sue for defamatory words published before or after his adjudication; and such damages as he may recover will not belong to his trustee. "The trustee can maintain no action of libel, although the injury occasioned thereby to the man's reputation may have been the sole cause of his bankruptcy";[68] nor can the trustee obtain an order directing that the damages be paid to him nor prevent the bankrupt (if he has got the damages) from spending them in the maintenance of himself or of his family.[69] The right to reputation is thus a superior species of inalienable and (so to say) spiritual property.

The existence of a hierarchy of values interests the law of libel in another way. It furnishes a rule or guide for determining

[65] See above. It may also be observed that a condition or contract in general restraint of marriage is illegal and void. Leake, *Contracts*, 8th ed. pp. 575, 584. As also are marriage brocage contracts: *Ibid.* Again certain of the duties and rights of parents are inalienable at Common Law: see e.g. *Eyre* v. *Shaftesbury* (1722), 2 P. Wms. 103. *Humphreys* v. *Polak*, [1901] 2 K.B. 385. *Vansittart* v. *Vansittart*, 27 L.J. Ch. 289. And see *Re Carroll*, [1931] 1 K.B. 317: cf. *Re Sandbrook*, [1912] 2 Ch. 471; *Re Borwick*, [1933] 1 Ch. 657, in both of which cases a condition was held void because in the view of the court it tended to deter a parent from or hamper him in the discharge of his duty in the matter of the custody and education of his children.

[66] An action for slander of title "differs from an action of libel in this that malice is not implied from the fact of publication, but must be alleged and proved, and that the falsehood of the statement complained of, and the existence of special damage, must also be alleged and proved in order to entitle the plaintiff to recover": *Hatchard* v. *Mege* (1887), 18 Q.B.D. per Day, J., at p. 775.

It is also noteworthy that our "artificial law" of slander in its rules as to words spoken in relation to Office, Profession, or Trade reflects the concern that the Common Law always has for life and *the means of livelihood*. For another instance see *Clayards* v. *Dethick* (1848), 12 Q.B. 439.

[67] *May* v. *Lane* (1894), 64 L.J., Q.B., per Rigby, L.J., at p. 238.

[68] *Howard* v. *Crowther* (1841), 8 M. & W., at p. 604.

[69] See Gatley on *Libel and Slander*, 2nd ed., p. 434; and cases cited.

whether or not a particular occasion is a privileged occasion.[70] "Is it for the common convenience and welfare of society that a shipowner should be informed of the conduct of his captain which is *endangering the lives of his crew*? The law has answered that it was.[71] The question whether it is for the common convenience and welfare of society that a wife should be informed of her husband's misconduct is a very different question."[72] The Court of Appeal (differing in this respect from the trial judge) answered that it was not for the common convenience and welfare of society in the particular case. There was nothing in the occasion to outweigh the value the law sets on established reputation and marital unity.[73] A commentator in the *Harvard Law Review*[74] while agreeing with the decision, suggested none the less that the case might be different if a communication had been made in the honest belief that it was necessary to avert the risk of injury to the wife's life or health, e.g. from venereal disease. Here, as elsewhere, to adopt the language of Lord Maugham, in *Haynes* v. *Harwood*,[75] the law has to measure the interest it is sought to protect with the other interests involved.

[70] Cf. the scarcely helpful statement of Scrutton, L.J., in *Watt* v. *Longsdon*, [1930] 1 K.B. at p. 139: "This case raises, amongst other matters, the extremely difficult question, equally important in its legal and social aspect, as to the circumstances, if any, in which a person will be justified in giving to one partner to a marriage information which that person honestly believes to be correct, but which is in fact untrue, about the matrimonial delinquencies of the other party to the marriage. The question becomes more difficult if the answer in law turns on the existence or non-existence of a social or moral duty, a question which the judge is to determine, without any evidence, by the light of *his own* knowledge of the world, and *his own* views on social morality, a subject matter on which views vary in different ages, in different countries, and *even as between man and man*."

[71] *Coxhead* v. *Richards* (1846), 2 C.B. 569. The court was equally divided but professional opinion has always been that Tindal, C.J., and Erle, J., were right in holding that the occasion was privileged.

[72] Per Terence O'Connor, K.C. (now Solicitor-General), arguendo in *Watt* v. *Longsdon*, [1930] 1 K.B., at p. 136.

[73] The law sets a high value on family unity. Cf. the rule that communications between spouses do not amount to "publication" in law. Again, a domestic arrangement between spouses is not actionable as a contract: *Balfour* v. *Balfour*, [1919] 2 K.B. 571, C.A.: "The proposition that the mutual promises made in the ordinary domestic relationship of husband and wife of necessity give cause for action on a contract seems to me to go to the very root of the relationship, and to be a possible fruitful source of dissension and quarrelling. . . . Agreements such as these are outside the realm of contracts altogether. The Common Law does not regulate the form of agreements between spouses. . . ." "In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted."

One may note here that by way of exception to the ordinary rule of incompetence at Common Law either of the spouses was admitted to give evidence against the other in a case where he or she would otherwise be exposed without remedy to personal violence or injury: *R.* v. *Azir* (1715), Strange 633; *Bartley* v. *Cooke* (1784), 3 Dougl. 422.

[74] 43 H.L.R. 966–7

[75] [1935] 1 K.B., at p. 162.

In the measurement of these interests it is the modest purpose of this paper to suggest that the Common Law habitually uses a certain scale of objective values, the lesser of which it is ready to subordinate, and on occasion even sacrifice, to those of a higher rank[76]: and it is suggested in general (though the matter may be open to debate) that the use of this scale of values by the Common Law furnishes a reasonable rule.

[76] Cp. the scandal caused by the decisions in *Ex. p Marais*, [1902] A.C. 109, *R.* v. *Allen*, [1921] 2 I.R. 241; *R.* v. *Strickland*, [1921] 2 I.R. 317 under which the King's Courts appeared to abandon their supreme duty of protecting the lives of the King's lieges. See the pungent criticism of these cases by Dr. Leo. Kohn, *The Constitution of the Irish Free State*, pp. 136–142.

RICHARD O'SULLIVAN

MODERN TRENDS IN THE LAW OF TORTS

TO anyone who is used to consider the Common Law as a venerable body of rules, built up slowly in the course of centuries, a huge structure, to which has been added a new piece here and there, recent developments in the English Law of Torts must be a startling, and, to some, a disconcerting phenomenon. All the more so since the bulk of recent changes and extensions in tortious liability is due to judicial law-making. Statutory reforms have been confined to a few special, although important, topics. But judicial practice has done something more than that. It has introduced a new spirit to that part of the law. With the help of wide and general formulas, it has largely replaced the traditional method of taking, as a point of departure, a particular form of action, by a new method of finding a remedy for certain typical sets of fact and situations. This process has not been limited to the action of negligence which is of comparatively recent origin. Those modern principles of legal development, which have shaped the action of negligence, have also invaded other forms of action and partly altered their character. This evolution has now reached a stage where an examination from a comprehensive and co-ordinating point of view must be attempted.

It is the purpose of this article to do so, not from a purely analytical angle, but by taking into account the actual social and economic function of the different forms of civil liability. This approach will, it is hoped, enable us to proceed where a purely analytical approach would have to stop.

An observation on comparative law should help to make the object clearer. Most continental systems deal with tortious liability from a broad and comprehensive point of view. The French, Swiss and Italian Codes state, in various terms, a general duty of reparation for acts unlawfully damaging another.[1] The German Civil Code (Art. 823) is more explicit and determines liability by a number of certain "absolute" rights, the wilful or negligent violation of which engenders liability (apart from a general formula covering acts committed unlawfully and against *bonos mores*). Such absolute rights are property, bodily integrity, freedom, copyrights, etc. The English Law of Torts, on the other hand, has not started from a general principle of liability. The

[1] Cf. Walton, 49 L.Q.R., 78.

causes of action in tort have developed from various sources, unsystematically and with different objects, and this is still strongly felt in the law as it stands now. Some torts—in particular those which are in substance property actions, like trespass, conversion,[2] but not only those (see below)—centre round the protection of a certain right. The conduct of the plaintiff may or may not be material, but the gist of the action is interference with a certain right, not unlawful conduct. In this respect negligence, for example, is a tort of a quite different character.

It disregards the nature of the right interfered with. It does not consider the object of the action, but the source. It traces the injury back to its origin and thus arrives at stipulating the conditions under which such origin is actionable. This links the action of negligence to a number of other actions, such as most cases of nuisance, the action based on *Rylands* v. *Fletcher*, liability of occupiers of premises, owners of dangerous things, keepers of animals, etc. In all these torts the law looks at the defendant and stipulates to what extent his freedom of action is limited by responsibility towards his fellow-citizens. Indeed, injury or damage must be proved in all these torts; but such injury may be of any kind, whether personal, property or pecuniary damage in general. Sir F. Pollock, who stood for a general principle of liability in tort, did not seem to see any difficulty in classifying the whole law of torts both as to the duty and to the injured right. Quoting in support dicta by Lord Bowen in *Skinner* v. *Shew*, [1893] 1 Ch. 413, 422, and in the *Mogul Case* (1889), 23 Q.B.D. 613, and of Holmes, J., in *Ackens* v. *Wisconsin* (195 U.S., 194, 204), he established the general principle that one must not do unlawful harm to one's neighbour. (*Torts*, 13th ed., p. 6–21.) On the other hand, Sir F. Pollock also classified torts by the nature of the injured right. Having collected wrongs affecting personal rights under Group A, and wrongs to possession and property under Group B, he placed negligence, nuisance and breach of absolute duties under Group C as "Wrongs to the Person, Estate, Property generally." The very generality of this formula indicates that the torts belonging to this last group cannot, in fact, be classified by the nature of the injured right. Nor are the three groups linked with each other by an ethical element of liability, which, as Pollock shows, is strong in Group A, absent in Group B, and not strongly present in Group C. The central element of modern English tort is nevertheless, in Pollock's analysis, duty,

[2] Cf. Pollock, *Torts*, p. 12–15, on the way in which "a great bulk of what really belonged to the law of property, was transferred to the law of torts."

which he likens to the Roman *culpa*, while the cases of strict liability, which, from his point of view, appear as an anomaly, have their parallel in the Roman *quasi ex delicto*.[3]

The present study, without aiming at giving another deductive classification of torts, will be concerned with re-examining the torts collected in Pollock's Group C, but from a different angle, and on the basis of recent developments, which suggest that a purely analytical method would be in danger of losing sight of the actual function which the various torts exercise in modern life.

What holds these torts together, it is submitted, is a legal responsibility arising from the defendant's social situation rather than from any individual act. And what distinguishes them from the other torts is that these deduce liability not from the conduct and situation of the defendant, but from the violation of a certain right of the plaintiff.[4] So trespass to land and certain cases of nuisance closely related to trespass (cf. *Nicholls* v. *Ely Sugar Beet Factory*, [1931] 2 Ch. 84), conversion, all injuries to the person, to domestic and contractual relations (quasi-proprietary rights) to reputation, and possibly the tort of Conspiracy are determined by the injured right, not by the defendant's duty.

In a functional investigation—of which Prof. Bohlen has given in his study of *Rylands* v. *Fletcher*[5] an outstanding, but isolated example—we shall find that there is little use in comparing forms of liability which lie in different planes and have different potentialities of development. So the action of negligence, on the one hand, is conceived as a general remedy, not to suit typical and simple facts, as e.g. trespass to land, but to cover an unlimited variety of injurious acts arising out of the manifold contacts of modern life. A comparison of the definitions of say trespass and negligence shows the fundamental difference in scope and function of these two torts. In trespass *quare clausum fregit* the act of entering upon land without lawful justification produces the liability. But in negligence (cf. the clas-

[3] An interesting recent attempt to see the law of torts under a general and unifying aspect is that of the late Dean Leon Green, who sees the "Relational Interest" as the object of protection and examines all tort from this point of view. (29–31 All. L.R.)

[4] Indeed, they have not been left quite untouched by the principle of moral responsibility, that is liability for fault only, which until recently held the field of civil liability. This can be seen by the development of the defence of inevitable accident. But trespass to land (trespass to person and goods has become almost indistinguishable from negligence, cf. Winfield and Goodhart, 49 L.Q.R., 359) is still based on injury to the right of property, although possibly mitigated to some extent by the defence of inevitable accident (cf. Salmond, *Torts*, 9th ed. sec. 5 (2).

[5] *Studies in the Law of Torts* (1911).

sical definition of Alderson, B., in *Blyth* v. *Birmingham Waterworks* (1865), 11 Ex. 784) the gist of the action is "doing or omitting to do something" and that "something" may be anything which a reasonable man would do or omit to do. The duty of care in negligence is equally "dynamic" as compared with the "static" character of trespass. The duty of care is determined by a relation, and the number and variety of such relations is infinite. Negligence is a concept of modern, trespass one of ancient juristic thinking. Negligence again is linked and, as we shall see, partly intersects with a group of torts, such as liability for dangerous things, nuisance, the rule in *Rylands* v. *Fletcher* and other cases of absolute responsibility, by the common notion of a duty springing from control. Recent developments in some of the most important torts belonging to this group suggest a re-examination of their nature and the relation in which they stand towards each other.

But to define the object of this study, we have to make a further distinction, strangely neglected in the analysis of tortious liability in English law, yet of the greatest practical importance and based on the nature of the relation between the parties. The control of property, whether this property be land, house, business, factory, creates a two-fold duty and responsibility—

1. Against those who are already in contact with the property and therefore stand in some kind of legal relation towards its owner from two different angles. These relations can be considered (*a*) as relations between the property owner and those who voluntarily come within the realm of his property. From this point of view arise the various categories of duties of an occupier of premises towards his visitors, classified, with much ingenuity, as contractors, invitees, licensees (with or without interest), trespassers and persons entering as of right. (*b*) They may be classified according to the kind of activity in the exercise of which the plaintiff comes into contact with the property of the defendant. All relations between employer on one hand and employee or workman on the other hand belong here. They are to-day dealt with under the rules of common employment and *volenti non fit injuria*, mitigated by statutory duties and the Workmen's Compensation Act, but at the same time under the above mentioned categories of visitors to the premises, i.e. from the angle of the property owner. It would be the object of a special study to examine these types of tortious liabilities on their true sociological basis. What matters here, is that the responsibility which the occupier of premises may have either as employer towards his employees or as property owner towards those who come on

his property, is quite different, legally and socially, from the responsibility which he has against—

2. Outsiders, i.e. members of the public who suffer damage from the property, without having voluntarily come in contact with it before and thereby having established a legal relation towards the property owner or the person in control of the property.

It is only with tortious liability arising out of this latter type of responsibility that this article will be concerned.

A. Summary of Traditional Analytical Distinctions

The relations between torts of this latter type have been investigated by Prof. Winfield in an exhaustive, but strictly historical and analytical survey (4 *Camb. Law Journal*). The principal contentions of the learned author—in so far as they are relevant for the present inquiry—are the following—

I. Nuisance and Negligence

1. In Negligence the plaintiff must prove a duty of care, in Nuisance he must only prove an injury.

2. In Negligence the question is: Did the defendant take reasonable care? In Nuisance unreasonableness is also a main ingredient of liability. But it is found by balancing all the circumstances. Absence of reasonable care makes the defendant liable in Nuisance, but the exercise of due care does not necessarily relieve him from all liability.[6]

3. Contributory negligence is not an independent defence in Nuisance; it only comes in as one factor in the general test of reasonableness.

II. Nuisance and Rylands *v.* Fletcher

These two torts are closely related, as they fight a similar type of evil. Consequently, the differences which Prof. Winfield finds, are not of a fundamental character. His principal points are:

1. In Nuisance the non-occupier of land may be liable, in *Rylands* v. *Fletcher* occupation is essential.

2. In *Rylands* v. *Fletcher* the defendant is liable for wrongs of his

[6] It is doubtful whether it is correct to treat, as Winfield does, public and private nuisance as parts of one and the same action. "Public and private nuisance are not in reality two species of the same genus at all" (Salmond, *Torts*, 9th ed. p. 229). It is submitted that they start from different bases. Even where an individual can prove special damage arising from a public nuisance, like obstruction of a highway, this is nothing but the necessary condition for bringing a claim in civil law at all, without altering the nature of the liability. The injured right in public nuisance is not property, as in private nuisance, but a right of the public. The duty of the landowner is in the nature of a public charge on his property. It is therefore absolute, independent of fault. The difference between the standard of duty in public and private nuisance has been clearly stressed by Bankes, L.J., in *Job Edwards* v. *Birmingham Navigation Co.*, [1924] 1 K.B. 350, but it has not been further developed by either subsequent judgments or legal science. (See, however, Charlesworth, *Liability for Dangerous Things*, p. 73, and Goodhart, *Essays*, p. 166n, who mention the difference.) To the extent to which the duty in private nuisance is developing towards a strict character (see below, p. 45) the practical difference between public and private nuisance will again decrease.

independent contractor, not so in Nuisance, except where such liability would exist in any tort.

3. The liability in *Rylands* v. *Fletcher* is based, according to *Noble* v. *Harrison*, [1926] 2 K.B. 332, on (*a*) unnatural use of land, (*b*) escape of dangerous objects. Whether (*a*) is essential in Nuisance, is doubtful, (*b*) certainly is not.

All these contentions will be examined below.

A number of further differences alleged by Winfield are not concerned with the gist of the action or liability, but with differences in the legal defences and consequences, on the assumption that the actions are different in substance. But such points of difference can obviously throw no light on the question, which they presuppose as answered, how far, in the light of modern developments, the actions still differ in substance.

B. Criticism of Present Analytical Distinctions

Altogether Prof. Winfield leaves us with the impression that nuisance and *Rylands* v. *Fletcher* are closely related actions, but differ in a number of details, and that nuisance and negligence tend to be more clearly distinguished from each other, through the development of duty of care on the one hand and the test of unreasonableness on the other. Are we to stand there? If we pursue a purely analytical method, we cannot indeed go much further than to take stock from time to time, and try, by means of subtle distinctions, to keep the different torts neatly separate. In a very valuable chapter on the nature of the liability under *Rylands* v. *Fletcher*, Dr. Stallybrass (in Salmond, 9th ed., sect. 149) has come to the conclusion that this type of liability is now covered by Negligence. This shows that modern English jurists begin to question the value of archaic distinctions. Recent English decisions make a further and more comprehensive inquiry necessary. To take a few examples, how is it possible still clearly to preserve the traditional distinctions, when in *Northwestern Utilities* v. *London Guarantee Co.*, [1936] A.C. 108, a Gas Company was held liable for an explosion caused in an hotel through leaking gas, the leakage having been caused by the intervening operations of third persons, not indeed under the rule in *Rylands* v. *Fletcher*, the so-called strict liability (which is excluded by an act of a stranger) but in negligence, for not having foreseen and guarded against such operations? Or if in *Shiffman* v. *Order of St. John*, [1936] 1 All E.R. 557 the defendants were, in Atkinson, J.'s, opinion, liable not only in negligence, but also under *Rylands* v. *Fletcher*, for a flagpole erected by them near a public highway and injuring, by its fall, a man resting on the highway (Hyde Park). Or if in *Matania* v. *National Provincial Bank*, [1936] 2 All E.R. 638, the Court of Appeal decided that he, who has authorized structural alterations to be carried out by an independent contractor, is not only liable for the latter's

negligence, but also for nuisance caused to a third in the course of the operations. In view of such decisions it seems more fruitful to investigate the sociological scope and function of the various actions, the social situation from which everyone of them arises. Every legal notion and institution bears the stamp of the time in which it was created. They may be like children born from different parents, with different inherited qualities and different potentialities of development.

The common feature of the torts examined by Prof. Winfield and their "children" or "relatives" (in that they all belong to the group of torts as determined above on p. 43), seems to be that they all place a certain responsibility upon a person who is in control of property which, without being dangerous as such, causes injury to a member of the public, whether by its static condition (house) or by the way it is used and operated (factory products, business). This idea is behind—

1. Negligence in all cases of manufacturer's (*Donoghue* v. *Stevenson*, [1932] A.C. 562) and houseowner's (*Wilchick* v. *Marks*, [1934] 2 K.B. 56) liability. This includes all cases traditionally dealt with under the head of liability for dangerous property, animals or fire.

2. *Rylands* v. *Fletcher*. The occupier of land, who brings and keeps on it anything likely to do damage if it escapes, is liable for all direct consequences of escape.

3. Private nuisance. "Private nuisances . . . are interferences by owners or occupiers of property with the use or enjoyment of neighbouring property" (Talbot, J., in *Cunard* v. *Antifyre*, [1933] 1 K.B. 557, Charlesworth, p. 67).[7]

C. Re-examination on the Basis of Recent Developments

I. *Development of Nuisance*

Private nuisance is essentially a remedy as between different property owners, and the question of what amount of interference with the neighbour's enjoyment of property must be tolerated as being reasonable in law, is one of mutual adjustment.[8] It is

[7] Fletcher Moulton, L.J., one of the most constructive legal minds among English judges, in *Wing* v. *L.G.O.*, [1909] 2 K.B. 665, goes further in defining nuisance—so as to comprise *Rylands* v. *Fletcher*, cf. Bohlen, *Studies*, p. 414–15—as "an excessive use of some private right whereby a person exposes his neighbour's property or person to danger." But the extension—which seems to go further than warranted by English Law—lies in "excessive" and in the injured, right being "property and person," which comprises both private and public nuisance. But what matters here, the inadequate control of some object of property as source of liability, is clear in this as well as in Talbot, J.'s, definition.

[8] Nuisance consisting in material injury to property, like fumes ruining crops (*St. Helen's Smelting Co.* v. *Tipping* (1865) 1 H.L.C. 642) is of a stricter character. It is in substance much more closely related to trespass than to the other types

the idea of mutuality which underlies Bramwell, B.'s, formula of "give and take" as used in *Bamford* v. *Turnley* (1860), 3 B. & S. 83. The lawfulness of the interference is measured by the standard of reasonable neighbourhood, and this is to be ascertained by what the plaintiff would himself have to tolerate in similar circumstances.[9] But this brings us at once to the limitations of the rule of "give and take." The test of mutuality only works where the interests are homogeneous. When a farmer causes a nuisance to his neighbour farmer by burning his refuse, it is easy to measure the limit of tolerance by what is usual in farming. Here the rule of give and take applies. But the real difficulty arises when unhomogeneous interests clash. Here the test of unreasonableness must be measured by a dynamic element, the balancing of conflicting social and economic values. So a factory may be started in a farming district, a residential quarter may be gradually transformed into a business quarter. It is generally admitted that the standard of comfort is variable, but it is generally said that the test is what the average man in the locality would think. Here, however, as in other parts of the law, e.g. the notion of "natural user of land" in *Rylands* v. *Fletcher* (see below, p. 51), this test is based on a stable society, not on a developing one. The first factory in a farming district, the running or by-products of which attract noxious animals which injure crops in the neighbourhood, causes obviously a nuisance,[10] and unless the causing of such nuisance is protected by statutory authority—which will only be granted to such enterprises as are in the public interest and does not, of course, protect avoidable nuisance (*Farmworth* v. *Manchester Corporation*, [1930] A.C. 171)—the factory must see whether the profits will cover such overhead expenses as liabilities for nuisances caused through the running of the factory. A second factory may already be in a better position. The standard of comfort may no longer be so clearly that of a farming community, and eventually a solitary farmer may possibly be held to cause a nuisance to the workers of a factory nearby through the noise of cattle or the smell of farm-yard manure. A parallel problem occurs when a quiet residential quarter is invaded by

of private nuisance. From trespass it is only distinguished by the archaic distinction between trespass and case. Whatever the practical importance of the difference between trespass and case ruling still be, it is not a distinction appropriate to a modern system of law. Modern law asks whether the injury to a right is determined strictly or by reference to a flexible standard depending on mutuality of relations and balance of interests.

[9] In this way malice finds a place in the law of nuisance. Cf. *Christie* v. *Davey*, [1893] 1 Ch. 316 (nuisance by malicious piano-playing); *Hollywood Silver Fox Farm* v. *Emmet*, [1936] 2 K.B. 468, cf. 52 L.Q.R., 461; 53 L.Q.R. 1.

[10] The astonishing decision in *Stearn* v. *Prentice Bros.*, [1919] 1 K.B. 394 (see below, p. 49), must be explained, although not justified on other grounds.

business and industry. Once the character of the locality is fixed, it is comparatively easy to fix the standard of comfort, to state the differences between Mayfair and Bermondsey, etc., but while it is in transformation, it is difficult. In *Polsue & Alfieri* v. *Rushmer*, [1907] A.C. 121, the House of Lords protected a resident against the noise caused by printing machines in Fleet Street. It held that even taking into account the character of the locality, yet the defendants' machinery caused a serious additional interference. This clearly shows the problem. It also appears, with a touch of human tragedy, in *Hoare* v. *McAlpine*, [1923] 1 Ch. 167, where the defendants, by driving piles into the soil in preparing the site for a large City building, caused heavy vibrations to the plaintiff's old house. Astbury, J., evaded the issue by forcing the vibrations into the category of "*Rylands* v. *Fletcher*" things, incorrectly, as Sir F. Pollock points out (*Torts*, 13th ed., p. 505). The real problem was one of nuisance, and it would have been difficult to protect the plaintiff's fragile house in the midst of the City against a new business building. The problem arose afresh in *Andreae* v. *Selfridge*, [1936] 2 All. E.R. 1413, where Bennett, J., held the defendants liable in nuisance for loss caused to a neighbour through the construction of steel framework, riveting, demolition of houses, without any negligence.

As regards the objective side of liability, then, he who starts an undertaking of a type not yet usual in the locality, bears the risk of interference with the average man's comfort. He pays a premium in the form of compensation for nuisances caused and may pave the way towards a gradual transformation of the character of the locality.[11] In this sense it is true to say that nuisance is not a branch of the law of negligence (Salmond-Stallybrass, *Torts*, 9th ed., p. 240). Reasonable care and skill and even all possible care and skill does not relieve from liability.

So far we have examined the objective condition of liability in nuisance and found that it is not identical with that of negligence. But there is the further question of the subjective incidence of liability, and here the question of negligence, not as an independent tort, but as a form of committing a tort, arises. Although nuisance is a liability incumbent upon the property and therefore on the occupier as such, it would be wrong to conclude that the liability arises independently of negligence. The position may be summed up as follows: Whoever creates a nuisance is liable for it. Apart from that, he who knew, or ought to have known

[11] In cases of public utility enterprises, a similar development is often started by granting Statutory authority. But where the authority is only conditional, as in most cases (see the Smallpox Hospital case, *Metr. Asylums District Board* v. *Hill* (1881), 6 App. Cas. 213), it does not protect against liability for nuisance.

of the nuisance, is liable for it, provided and probably only as long as he is the occupier. That active creation of a nuisance creates liability regardless of occupation, is clear law (*Thompson* v. *Gibson* (1841), 7 M. & W. 456; *Dalton* v. *Angus* (1881), 6 App. Cas. 740; Salmond, p. 247). But what is less clearly established, and is largely a conclusion from recent decisions, is that the occupier's liability is dependent upon knowledge or means of knowledge, or in other words upon negligence. It will suffice to quote three recent decisions—

1. In *St. Anne's Well Brewery Co.* v. *Roberts* (1928), 140 L.T.1, the defendants who owned part of the city wall of Exeter, were not responsible for the damage caused through a collapse of that wall to the plaintiff's inn on the other side, since, not being the occupiers of the land on which the wall stood they did not know nor ought to have known of the defective state of the wall. Scrutton, L.J., emphasised that the test would have been the same, had the tenant been sued.

2. The Court of Appeal had adopted the same attitude in *Job Edwards* v. *Birmingham Navigation Co.*, [1924] 1 K.B. 341. In that case nuisance was caused to the defendants' canal by burning refuse on the plaintiffs' waste land. The refuse had been brought there neither by plaintiffs nor defendants, but by third persons who transported it against charge over the defendants' canal. The Court denied that the plaintiffs were under a duty to remove a nuisance caused by the act of a third person, with emphasis on the fact that, while both plaintiffs and defendants were innocent, the defendants profited from the stranger's act by charging him for transporting the refuse over their canal.[12] The plaintiffs could therefore recover a contribution paid to the defendants for removing the refuse.

3. In *Noble* v. *Harrison*, [1926] 2 K.B. 332, Rowlatt, J., as member of a Divisional Court, stated the law in very similar terms.

These rules as to the incidence of liability in nuisance bring it well into line with other torts. Any wilful mischief always makes the author liable. Apart from that, liability in private nuisance —about the different principle in case of public nuisance see above, p. 43—springs from control. Responsibility is not imposed strictly, but control is understood as not going beyond foreseeability. That is the gist of the foregoing decisions.

[12] Stallybrass in Salmond, *Torts*, 9th ed., p. 246n (*c*) doubts the correctness of the decision and quotes with approval Scrutton, L.J.'s, dissenting opinion. But Scrutton, L.J., never denied the principle as stated above expressly approved in a note to *St. Anne's Well Brewery Case* by Dr. Stallybrass himself in 45 L.Q.R. 120. He only took a different view with regard to the extent of the duties of an occupier. His opinion in this and in the *St. Anne's Well Brewery Case* leave no doubt that he regarded liability as dependent on foreseeability, i.e., negligence.

II. *Development of the Rule in Rylands* v. *Fletcher*

The sociological meaning and function of *Rylands* v. *Fletcher*, as it stood in 1911, is explained in so masterly a way in Prof. Bohlen's celebrated study (*Studies in the Law of Torts*, p. 334 *seq.*) that little can be done but to continue his line of thought in the light of recent developments (with limitation to English Law), and to co-ordinate it with the development of the other torts surveyed in this study.

The special character of the rule rests upon five elements, each of which has, in the course of time, changed its original meaning.

1. The escaping thing must have been brought on the land, i.e. it must not be naturally there.

2. The thing must be likely to do mischief if it escapes.

3. The escape must not occur in the course of natural user of land.

4. The escape must be caused by someone within the sphere of control of the landowner, including independent contractors.

5. Originally the disturbance must be caused to the plaintiff's possession by escape from land in occupation of the defendant.

1. *Things not Naturally on the Land*

This was meant to emphasise the special responsibility incurred by industrial human activity as against the mere working of nature. Of all the foundations of the rule this one has received the scantiest and most unsatisfactory treatment.

Often it has been confused or identified with natural user of land.[13] To give only two instances, in *Giles* v. *Walker* (1890), 24 Q.B.D. 656, the defendant caused thistle growth by bringing forest land under cultivation, and the thistles damaged the plaintiff's crops. In a judgment three lines long the plaintiff was nonsuited, because the thistles were on the land "naturally," as the result of agricultural cultivation (which was not one of the industrial activities against which *Rylands* v. *Fletcher* meant to grant protection). More astounding is *Stearn* v. *Prentice Bros.*, [1919] 1 K.B. 394, where a heap of bones collected on the premises of a bone manure factory attracted rats, which invaded and injured the plaintiffs' crops. Bray, J., held, quoting *Giles* v. *Walker* in support, that the bones were on the land in the ordinary course of the defendant's business. Prof. Goodhart (4 *Camb. Law*

[13] So in *Pontardawe* v. *Moore Gwynn*, [1929] 1 Ch. 657, where parts of an overhanging rock broke away.

Journal, p. 13) has powerfully argued against the somewhat casual treatment of this question and has suggested—basing himself on a few less well known decisions like *Proprietors of Margate Pier* v. *Town Council of Margate* (1869), 20 L.T. 564[14] and *Bland* v. *Yates* (1914), 58 *Sol. Jo.* 612, and apparently treating the question as one arising equally in nuisance and in *Rylands* v. *Fletcher*—that the ordinary rules of nuisance apply in the case of natural nuisances, like thistle-growth, no less than in the case of piano-playing. That means, the test is that of reasonableness under the rule of "live and let live," and it would be anomalous to exclude liability altogether for things which are naturally there, howsoever dangerous they may be. In this argument, the rigid notion of a thing naturally on land becomes a flexible one, to be judged by a mutual relation as in private nuisance.

2. Things likely to do mischief if they escape

In 1867 it was probably still justifiable to talk of and deal with objects dangerous in themselves as a special category. Dr. Charlesworth, in a monograph on the subject published in 1922, still maintains this point of view, in classifying dangerous things as (1) dangerous in themselves; (2) dangerous by reason of their position; (3) dangerous because defective, and confines the application of *Rylands* v. *Fletcher* to the first of these groups. To-day it can be safely asserted that the category of things dangerous in themselves has, for all practical purposes, been given up, although lip service is still paid to it. (But cf. Scrutton, L.J.'s, metaphor of the wolf in sheep's clothing in *Hodge* v. *Anglo-American Oil Co.* (1922), 12 Ll.L. Rep. 187, and Lord Atkin's speech in *Donoghue* v. *Stevenson*, [1932] A.C. 562.) Dr. Stallybrass has given an exhaustive survey of all the things held to be dangerous under the rule in *Rylands* v. *Fletcher*, and these things include water, trees, motor cars, decayed wire ropes, vibrations, and, according to Bennett, J., in *A.G.* v. *Corke*, [1933] Ch. 89, even caravan dwellers (see 3 Camb., L.J. 394). In *Howard* v. *Furness Houlder Line*, [1936] 2 All.E.R. 781–790, Lewis, J., held that a valve wrongly so fitted that it allowed the escape of steam which caused an explosion, although not a dangerous article in itself, had, thereby become converted into a dangerous article. It seems clear then that the dangerous or mischievous character of a thing arises out of the peculiar circumstances of a case, that it is a flexible category, and that, in so far as certain things, like guns, are *prima facie*, more dangerous than others, this quality may merely increase the standard of care, but is not in itself a source of liability.

[14] Although this is not a Common Law case.

3. *Escape in the Course of Natural User of Land*

This notion, introduced by Lord Cairns in his judgment in the House of Lords, has developed into one of the most important elements of the rule. It rightly stands in the centre of Bohlen's investigations. Natural user of land was, as he says, interpreted by English judges, as any user, "to which mankind, at the very beginning of private ownership has put land . . . or uses for which the physical nature of the land itself marked it as peculiarly adapted to satisfy the pressing needs of a primitive society." (*Studies*, p. 371–99.) Such uses were mainly farming, residential use and—arm-making being an ancient activity—mining operations. Any undertaking of human industry, not within one of these established uses, was outside the protection, as the water-reservoir in *Rylands* v. *Fletcher* itself.

In those American States, which accepted the principle of *Rylands* v. *Fletcher* at all, this conception of natural user was modified, so as to protect use of land for the development of such industrial and commercial activities, as suited the development of the country (Bohlen, p. 369, 378, *et seq.*), but in England this interpretation, by a judiciary which assumed the standards of landed gentry, was preserved until very recently. *Rylands* v. *Fletcher* was decided in a period of social development, when the predominance of a landed gentry was already on the wane, but the standard of social values as applied by the judges was still that of the vanishing society—a phenomenon only too familiar to the student of history and sociology. In this respect the rule in *Rylands* v. *Fletcher* appears as a partial attempt to fix industrial development at a stage, when it was in full swing, and when any rule based on the state of affairs in 1867—industry and technique more and more encroaching upon rural society—was bound either to become soon obsolete or to adapt its contents to new social facts. English judges have tried until very recently to interpret the notion of "natural user" not as a framework, but precisely with the meaning given to it in 1867, as of an absolute character. There is, however, no absolute criterion to distinguish natural from unnatural user. (The same, as we have seen, is true about the test of reasonableness in nuisance.) Such general notions cannot possibly have any absolute juristic content; they must be filled with the social standards prevalent at a given time and determining what appears as "natural" or "unnatural" to that time (cf. Bohlen *passim*, particularly p. 351). Just as to a modern jurist there is no absolute rule of "Natural Law," there is no absolute rule of "natural user." What is natural to one period, is unnatural to another. The rule in *Rylands* v. *Fletcher* was an

attempt to offset or at least lessen the manifold dangers produced by new technical installations for the then recognised uses of land—agriculture, residence and mining, by imposing upon the person responsible for the installation a liability in the nature of insurance regardless of fault. This emerges clearly from the decisions which Dr. Stallybrass has compiled in 3 *Camb. Law Journal*, 394. Unnatural user was in 1901 the putting of gas pipes on land (*Batcheller* v. *Tunbridge Wells Gas Co.* (1901), 84 L.T. 765); in 1902 the laying of submarine cables (*Eastern & South African Telegraph Co.* v. *Cape Town Tramways*, [1902] A.C. 381), in 1921 the storage of DNP (*Rainham Chemical Works* v. *Belvedere Fish Guano Co.*, [1921] 2 A.C. 465). But natural users were the excavation of minerals so that water gravitates on to a neighbour's property (*Hurdman* v. *N.E. Railway* (1878), 3 C.P.D. 168, 174), or deep ploughing which sends the ordinary flow of water to the neighbour's land (Brett, M.R., in *Whalley* v. *L. & Y. Railway* (1884), 13 Q.B.D. 141, or the building of a wall (*St. Anne's Well Brewery Co.* v. *Roberts* (1928), 140 L.T. 1).

The transition to a more elastic conception of natural user, taking into account changing social conditions, was prepared by Lord Moulton in *Rickards* v. *Lothian*, [1913] A.C. 263–281, with the formula that the liability under the rule in *Rylands* v. *Fletcher* is excluded where the use made of the land is "merely the ordinary use of the land or such a use as is proper for the general benefit of the community." A similar test had indeed been applied by Farwell, L.J., in *Barker* v. *Herbert*, [1911] 2 K.B. 633 with regard to nuisance. Within *Rylands* v. *Fletcher* it meant a new departure. The test of the "benefit of the community" implied the possibility of weighing the respective social utility of business or industrial as against agricultural or residential use. In *Rickards* v. *Lothian* itself the provision of water supply to various parts of the house was held to be a natural, i.e. a non-actionable, use of land. Lord Moulton's judgment in that case had been made the basis of several modern judgments, in which it was decided whether damage caused by modern technical installations arose by natural user or not. The change of the meaning of "natural user" under new economic and social conditions becomes clear in *Collingwood* v. *Home & Colonial Stores*, [1936] 1 A.E.R. 74. In premises adjoining those of the plaintiff a fire originated, owing to some unknown defect in the electric wiring. The plaintiff's premises were damaged by the water used for extinguishing the fire. Greaves-Lord, J., held that, in the absence of negligence, the case was covered by the principles of *Rickards* v. *Lothian*, and the defendant was held not liable. "It would be very difficult to say

that the bringing of electric light on the premises was an unusual user of those premises." [15] On the other hand, in *Western Engraving Co.* v. *Film Laboratories*, [1936] 1 A.E.R. 106, where, in the course of washing cinematograph films, water ran through, from the defendants' factory premises, to those of the plaintiffs and damaged their property, the Court of Appeal applied the principle of *Rickards* v. *Lothian* in order to hold the defendants liable. Slesser, L.J., said that the defendants had used water in a particular and peculiar way for their own purposes, in order to carry on their industry, but not for any common benefit, so the general principle of *Rylands* v. *Fletcher* applied.

These two decisions elucidate the guiding principle behind the rule in *Rylands* v. *Fletcher*, as understood in England. Whoever starts an industrial or business undertaking for profit, must insure other people against any damage which might directly arise out of the working of such undertaking, however innocent or normal within the purposes of the undertaking such use might be. For any other use of a thing, even if specially brought on the premises and likely to do mischief if it escapes, a rule similar to the "give and take" of *Bamford* v. *Turnley* applies. If the use is normal—and normal is anything which, under given circumstances, is incidental to the standard of life of the average man—there is no liability under *Rylands* v. *Fletcher*, i.e. short of negligence or intent. But whether we can take the "common benefit" test to be the decisive criterion, in its full implication, is more doubtful. It is important to note that this formula fell from the same judge who, in *Wing* v. *L.G.O. Co.*, [1909] 2 K.B. 652, had defined nuisance as an "excessive use of a private right," a definition which is hardly in accordance with the actual position in Common Law (cf. *Mayor of Bradford* v. *Pickles*, [1895] A.C. 587). To judge the limitations of individual rights, by social ends, would be, on the whole, a novel departure in the English Common Law, and perhaps these latest developments in the interpretation of *Rylands* v. *Fletcher* pave the way towards such a development. (On the problem of excessive use of rights from a comparative angle, see Gutteridge, 5 *Camb. Law Journal*, 22, and Lauterpacht, *Function of Law in the International Community*, p. 18.) For the purposes of this study it is important to note that through the interpretation of "natural user," in modern decisions the dynamic element of a conflict between unhomogeneous interests, which we have observed in private nuisance, enters into the rule of *Rylands* v. *Fletcher*.

4. *Liability for Independent Contractors.*

A steady trend of recent decisions warrants the conclusion

[15] Strictly speaking, the escaping thing was not electric current, but water.

that the traditional distinction between an employer's liability for the acts of his servants and for those of his independent contractors has no longer any real meaning. The development of this question is typical for similar tendencies in many other parts of the Common Law. The original genuine distinction between liability for servants and for independent contractors is qualified by one exception after another, until the mere skeleton remains. The stage is now reached where the old principle must be replaced by a new one. It is unnecessary here to recount the whole development. Chapman has done that (50 L.Q.R. 71), and shown that it is now possible to formulate the following rule as to the liability for independent contractors: "The real test is whether the employer is under a duty to perform a certain act properly and not negligently, whether that duty is imposed by statute or by contract or by Common Law" (the latter comprising cases of absolute liability, creation of dangers on the highway, extra-hazardous acts, etc.). Chapman, in the course of an exhaustive examination of the authorities, shows that this idea underlies three judgments of Lord Blackburn (*Tarry* v. *Ashton* (1876), 1 Q.B.D.; *Dalton* v. *Angus* (1881), 6 App. Cas.; and *Hughes* v. *Percival* (1883), 8 App. Cas. 443).[16] Now a very recent decision of the Court of Appeal (*Matania* v. *National Provincial Bank*, [1936] 2 All.E.R. 638), extends the liability thus incurred for negligence of an independent contractor to a nuisance which he causes in executing the work. In that case the defendant had instructed building contractors to carry out structural alterations which caused dust and noise, and, thereby, serious disturbance to the plaintiff, a teacher of music, who occupied his rooms as sub-lessee under a lease containing a covenant for quiet enjoyment. The lessors not having authorised the alterations, the plaintiff successfully sued the defendants for nuisance caused through the work of their contractors. In holding the defendants thus liable, the C.A. relied upon the principle, reasserted in *Honeywill & Stein* v. *Larkin Bros.*, [1934] 1 K.B. 192, that a man was liable where he employed an independent contractor to do work, which of its very nature involves a risk of damage to a third party and applied it to damage in the nature of nuisance. The criterion of hazardous operations is, however, open to similar objections as the notion of "dangerous things." It is better to follow Lord Blackburn's general principle as formulated in *Dalton* v. *Angus* (1881), 6 App. Cas. 829, that a man causing something to be done the doing of which casts on him a duty, cannot escape from the responsibilities attaching on him of seeing that duty performed, by delegating it

[16] Cf. also *Black* v. *Christchurch Finance Co.*, [1894] A.C. 48.

to a contractor. But does this test not mean that, whenever an interference with a third person's right results from the way in which the work is carried out by the contractor or his servants, the employer is liable? For there is a duty not to interfere with another person's rights. After *Matania's Case* even the question whether the employer ought to have foreseen the interference (cf. Stallybrass in Salmond, *Torts*, p. 118) seems no longer material. As long as it was incidental to the performance of the work ordered, he is liable. There is, of course, the recognised exception that the employer is not liable for collateral negligence of the contractor, e.g. for injury caused by the fall of an iron tool placed by one of the contractor's workmen on the window-sill (*Padbury* v. *Holliday* (1912), 28 T.L.R. 494) or timber falling from a bridge under construction (*Hurlstone* v. *London Electric Railway* (1914), 30 T.L.R. 398). But would the position be different, if the contractor were a servant? Dropping a tool would be outside the scope of employment, just as lighting a pipe, while making a cardboard (*Williams* v. *Jones* (1865), 3 H. & C.). Neither act is incidental to the completion of the work. Collateral negligence is no easier to distinguish from incidental negligence than negligence within the course of employment from that which is not (cf. Chapman, *loc. cit.*, p. 81). If there is still any difference in the interpretation of the two terms, it is of a casual character, and too weak to support any special rule for the liability of an employer for his independent contractor.

5. *Disturbance to the Plaintiff's Possession by Escape from Land in the Defendant's Possession*

Here again the rule in *Rylands* v. *Fletcher* is rapidly moving away from its original position. At first there was the limitation which made *Rylands* v. *Fletcher* principally an action between neighbouring landowners. The limitation on the defendant's side went in *Midwood* v. *Mayor of Manchester*, [1905] 2 K.B. 597, where the defendant was liable for an explosion caused by the fusing of a defective electric cable laid on the adjoining roadway by the defendant. (This was affirmed, on very similar facts, in *Northwestern Utilities* v. *London Guarantee Co.*, [1936] A.C. 118. In the *Charing Cross Electricity Case*, [1914] 3 K.B. 772 the limitation on the side of the plaintiff disappeared. The rule was applied as between two companies using a highway as licensees under statutory authority for the transmission of water and electricity. Even in this case it might still be said that there was at least a quasi-possessory right. The plaintiff company was injured in an undertaking which, with the ground occupied, constituted a definite physical complex. Charlesworth has suggested

(*loc. cit.*, p. 68) that "anyone who is injured by the dangerous thing, without any restriction whatsoever," would be entitled to sue. Atkinson, J., adopted this view in *Shiffman* v. *Order of St. John*, [1936] 1 A.E.R. 557, where the plaintiff was injured by the fall of a flagpole erected in Hyde Park, when he was resting. The rule in *Rylands* v. *Fletcher*, he said, applied between licensees (the plaintiff here was a licensee on the highway, his licence was that of a member of the public and not based on any special right or concession at all). If this reasoning is correct, there is no difference, either as regards the source or the victim of the injury, between *Rylands* v. *Fletcher*, and a negligence action.

One significant limitation in the scope of application of the rule in *Rylands* v. *Fletcher* remains, as the judgment of Lewis, J., shows, in *Howard* v. *Furness Houlder Line*, [1936] 2 A.E.R. 781. There must be an escape. A person on the premises, on which the damage originates, cannot sue under the rule, although he may sue in negligence. READ N.J. LYONS & CO.

Finally we must examine the recognised exceptions to the liability under the rule in so far as they show its true function.

Of the five generally recognised exceptions, those of statutory authority, consent or default of the plaintiff merely express the general principle of law that, where there is authority for the doing of the act, it is not unlawful against those on whom the authority is binding.

The other two exceptions, act of God and act of a stranger, are more significant for the present inquiry. They both express the idea that liability, whether strict or otherwise, stops at the limits of control. In the one case, in which the defence of an act of God was successful, *Nichols* v. *Marsland* (1876), 2 Ex. D., the reasoning of the Court was clearly based on negligence. "The flood was so great that it could not reasonably have been anticipated." (Mellish, L.J.) Later decisions, bring the idea of control out even more clearly so in *Greenock Corp.* v. *Caledonian Railway*, [1917] A.C. 556, where, owing to an extraordinary rainfall, a pond, constructed in the bed of a stream, overflowed, Lord Finlay said—

> "It is the duty of anyone who interferes with the course of the stream to see that works which he substitutes for the channel provided by Nature are adequate. . . ."

As to the defence of an act of a stranger, it goes probably further in limiting the responsibility of the defendant than the corresponding defence of a *novus actus interveniens* in negligence. In *Northwestern Utilities* v. *London Guarantee & Accident Co.*,

[1936] A.C. 108, an hotel, belonging to the plaintiffs, was destroyed by fire caused through the escape and ignition of gas from a joint belonging to the defendants, a public utility company which supplied gas. The cause of the break lay in underground operations of the city close to the defendant's main. The defendants were not liable under the rule in *Rylands* v. *Fletcher*, the interposition of an act of a stranger excluding the strict liability according to *Box* v. *Jubb* (4 Ex. D. 76), and to *Rickards* v. *Lothian*, [1913] A.C. 263. But the Judicial Committee, through Lord Wright, said that this left the question of negligence untouched, and decided that the duty of care of the defendants, who "had the tremendous responsibility of carrying this highly inflammable gas under the streets of a city" included the duty to foresee and guard against the possibility of interference by the act of a stranger. And where the *novus actus* ought to have been anticipated by the defendant, the original act will be treated as the direct cause of the damage in negligence (Salmond, 9th ed., sect. 34, p. 150–155). In this decision the roles of *Rylands* v. *Fletcher* and of negligence are actually reversed. Where the "strict" liability of *Rylands* v. *Fletcher* ceases, the liability for fault, namely negligence, may still come in on the identical facts.[17] The only difference is one of perspective. Under *Rylands* v. *Fletcher* the installed plant is examined as the cause of mischief, in negligence it is the act which produced the installation.

The result of the foregoing examination of the principal elements of the rules in *Ryland* v. *Fletcher* can be summarized very briefly; in every one of them the tendency has been to replace a rigid notion with a content fixed once for all by an elastic one to be determined by a relation between the parties, which makes it possible to some extent to balance interests, and brings the action of the *Rylands* v. *Fletcher* type near to Negligence. We have thus detected the common principle of responsibility arising from special activity in private nuisance and in *Rylands* v. *Fletcher*.

III. Development of the Action of Negligence

To what extent is the same principle behind the action of negligence? If we examine the action of negligence from this angle, i.e. from a certain social activity radiating its effects upon the outside world, we have to leave aside a large group of negligence cases, namely all those which arise out of the conduct of one individual towards another individual. Traffic accidents, negligent treatment of patients by doctors, collisions between steamers

[17] In *Shiffman's Case* (above p. 56) Atkinson, J., eliminated any difference between the defences of intervening acts in the two actions by saying that the rule of *Box* v. *Jubb* only applies where the act of the stranger ought not to have been anticipated, i.e. where there is no negligence.

or motor cars do not concern us here. However much in these types of cases the former moral standard of conduct may have given way to the average standard of conduct of the man "on the Clapham omnibus," it is still individual conduct which is examined. It is a question for the jury, directed by certain rules of evidence. The kind of negligence case arising out of the situation described in this study is of a completely different nature. They are now mostly dealt with as cases of "manufacturer's liability," but comprise the responsibility of any other person in control of a complex of property that may cause injury to a member of the public, whether factory or business or a tenancy house. We have met the same kind of defendant before: in nuisance where the use of his property interfered with the neighbours' enjoyment of property; in *Rylands* v. *Fletcher* where some kind of substance emanating from his property injured a member of the public, no longer only possessors of land, but any passer-by according to recent decisions. Now we find him dealt with in negligence in a new capacity, but in one which, at the same time, comprises some of those dealt with by the other torts: as producing goods or as owning other more static kind of property which comes into contact with the public.

Since *Donoghue* v. *Stevenson*, [1932] A.C. 562, this type of negligence liability has gained increasing importance and has been clarified by so many learned comments that, for the purposes of this co-ordinating survey, it will suffice to sum up the main principles, which govern this type of negligence liability:

(For simplicity, we shall speak of "manufacturer's liability," although, as defined above, the circle of persons and situations that fall under this liability, is wider.)

1. Contractual obligations leave untouched the question of tortious liability to some one injured by the manufacturer's product (*Donoghue* v. *Stevenson*, [1932] A.C. 562).

2. The manufacturer's liability is not confined to any particular class of objects, and certainly not to things "dangerous in themselves." Danger is relative and is measured by the circumstances of the particular situation. (*Donoghue* v. *Stevenson*, above; *Grant* v. *Australian Cotton Mills*, [1936] A.C. 55; *Howard* v. *Furness Houlder Line*, [1936] 2 A.E.R. 731.)

3. The liability of the manufacturer is probably not limited by any kind of privity towards the plaintiff nor excluded by intervening circumstances, which might in other cases, amount to contributory negligence. Lord Atkin's test of proximity in Donoghue's case (the snail in the ginger bottle) has been criticised (e.g. by Pollock, 49 L.Q.R. 22) and disregarded by the Judicial Committee in Grant's case, where an excess of sulphur in undergarments produced by the defendants and sold by retailers injured the plaintiff. Dicta by Lords Atkin and Macmillan to the effect that an unused opportunity of inspection by an intermediate person might exclude the liability, made in the Snail case, have been disregarded in Grant's case and rejected in two American cases: *Rosebrock* v. *G.E. Co.* (1923) 236

N.Y. 227; *Smith* v. *Peerless Glass Co.* (1932) 259 N.Y. 292. The argument used by the American Courts, that the manufacturer of defective goods is bound to contemplate that an intermediate handler may pass them on without discovering their condition, is the same as used by the Judicial Committee in the Northwestern Utilities case (above, p. 56). Nor has a dictum by Greer, L.J., in *Farr* v. *Butters*, [1932] 2 K.B. 606, suggesting that contributory negligence might exclude the liability, where the plaintiff had a reasonable opportunity of inspection, been taken up.

(On this whole question Cf. Underhay, 14 *Canadian Bar Review*, 283–294.)

4. The principle of *res ipsa loquitur* applies in all these cases in a twofold manner:

(*a*) the plaintiff need not show that the defendant actually caused or knew of the defect that caused the injury. The fact of the plaintiff's injury is sufficient evidence of the defendant's negligence for the case to go to the jury. (Cf. Underhay *loc. cit.*)

(*b*) the manufacturer's responsibility is comprehensive and covers all acts or omissions within the sphere of his control, defects of the plant or of the product, and acts of his servant as well as of his independent contractors. "The appellant is not required to lay his finger on the exact person in all the chain who was responsible, or to specify what he did wrong. Negligence is found as a matter of inference from the existence of the defect taken in connection with all the known circumstances." (Lord Wright in *Grant* v. *Australian Knitting Mills*, [1936] A.C. 114.)

Whether the manufacturer could, by apt evidence, rebut the inference, is left open in Grant's case. But it is difficult to see what other evidence could be adduced than that of a third person, say the retailer, interfering with the state of the product. This is precisely the case in which liability is also excluded in nuisance and *Rylands* v. *Fletcher*, and probably, under the rules of remoteness of damage or of foreseeability, in any tort. But since the manufacturer is certainly liable: (*a*) for defects in the plant, (*b*) for acts of his employees, (*c*) for acts of independent contractors, (*d*) for any defect of the product whose origin cannot be proved (*res ipsa loquitur*), it may be safely asserted that the manufacturer's liability is in the nature of absolute responsibility for the sphere of his industrial control.[18]

The same principles have been applied to persons socially in a position analogous to that of the manufacturer, in relation to the public. In *Cunard* v. *Antifyre*, [1933] 1 K.B. 551 the defendants were liable as occupiers of buildings which they were liable to keep in repair, to the plaintiffs, the tenant and his wife, who occupied a flat in the building, for injury caused through a piece of guttering that fell from the main roof through the glass roof and injured the plaintiff's wife. The defendants, as in control of the building, owed a duty of care to the tenant and his wife, as being in their reasonable contemplation persons closely and directly affected

[18] The development of statutory negligence (*Lochgelly Case*, [1934] A.C.1) goes in a similar direction. But statutory negligence applies to the relations between employer and employee (see below).

by the neglect of that duty. In *Wilchick* v. *Marks*, [1934] 2 K.B. 56 the plaintiff was walking along the street, when she was injured through the fall of a defective gutter from a house on to the highway. The defendant was held liable as house-owner, although neither landlord nor tenant were, by the tenancy agreement, under an obligation to repair, since he still retained sufficient control over the house to do such repairs as were necessary. From the neglect to do so, despite his knowledge of their necessity, Goddard, J., deduced a neglect of duty towards third persons like the plaintiff, likely to be injured by such neglect. In *Malfroot* v. *Noxal* (1935), 51 T.L.R. 551 the repairer of a motor-cycle was liable to a passenger of the owner, on similar principles.

This liability arising from control includes those torts which are commonly dealt with in special chapters, but are in fact applications of the same principle, namely liability for dangerous things, for animals and for fire (apart from special statutes). Space does not permit to examine these torts more closely in the light of our principle.

A few decisions seem, at first sight, to restrict the scope of this type of negligence action. So, in *Otto* v. *Bolton*, [1936] 2 K.B. 46, Atkinson, J., declined to hold the seller of a house liable to the mother of the buyer, who was injured in the house, by a piece of plaster falling from the ceiling. The learned judge followed the decision of the Court of Appeal in *Bottomley* v. *Bannister*, [1932] 1 K.B. 458, which he thought was not affected by *Donoghue* v. *Stevenson*, [1932] A.C. 562. In *Bottomley's Case* a vendor of an unfurnished house was not liable to the purchaser or his wife for poisoning caused by a defective gas boiler. In so far as Atkinson, J., in *Otto* v. *Bolton* sought to distinguish these cases—where accidents happen in a house, either bought or rented—from *Donoghue's Case* by the possibility of intermediate inspection—absent in the latter but present in the former—the reasoning hardly holds good after Lord Wright's judgment in *Grant's Case*, [1936] A.C. 114. But the real basis of the decisions is the traditional difference between the principles governing dealings with real property and with chattels. This difference has so far withstood the trend towards simplification of the law. Cf. *Cavalier* v. *Pope*, [1906] A.C. 428, Lord Macmillan said in *Donoghue* v. *Stevenson*, [1932] A.C. 609, that it was in a different chapter of the law. *Otto* v. *Bolton* reaffirms this opinion. Whether the preservation of that distinction is in accordance with the spirit of the new Real Property Statutes, which want to make real property a suitable object of commercial transactions, is a problem too complex to be discussed in this article (cf. the learned remarks in *Annual Survey*, 1936, pp. 170–71). Apart from the special

rules governing the relation between landlord and tenant, the restrictive character of which excluded other principles of obligation, there is one reason why this case is different from the Snail case type. The principle of responsibility, arising from control, applies to the relation between the defendant and any member of the public not linked with him by any other legal relation. Where a person is inside premises, whether land, house or factory, he stands to the occupier in some kind of privity, whether as contractee, invitee, licensee or even as trespasser. This necessitates special and different legal rules. The contrast emerges clearly from *Howard's case*, [1936] 2 A.E.R. 781, facts see above, p. 50. Towards the first defendants the plaintiff, who was injured while working on the premises, stood in the relation of a licensee with interest, and they were not liable under the rule in *Rylands* v. *Fletcher*, since there was no escape from the premises. (Negligence was not proved against them.) But the second defendants, who had fitted the defective valve, were liable under the principle of *Donoghue* v. *Stevenson*.

It follows that even that last pillar of a special "strict" liability in *Rylands* v. *Fletcher*, the *prima facie* liability, without proof of negligence, distinguishes it from the manufacturer's type of negligence liability in name rather than in substance. Undoubtedly there is a difference in pleading. In a *Rylands* v. *Fletcher* claim only escape need be pleaded; in a negligence claim, negligence must be pleaded. More than twenty years ago the late Dean Thayer had suggested[19] that the apparent differences in evidence come to very little, because of the principle of *res ipsa loquitur*. Our survey of recent judicial practice fully proves the correctness of this theory.

Negligence has gradually approached other torts, which started from other points of departure, by making the subjective elements of liability more and more objective. Duty was implied from control, and liability attached to duty. Where Mr. Justice Holmes observed, many years ago in his *Common Law*, the development from an individual standard of conduct based on moral fault, to the average standard of the reasonable man, even this "objectified" form of moral responsibility gives way to responsibility ensuing from certain social facts.

SUMMARY

1. Private nuisance is still limited to injuries to property interests. Where a man sets up some new business or industrial undertaking, and thereby interferes with the average standard of comfort, he is liable in nuisance. For such private nuisances as arise on the basis of homogeneous interests, the rule of "give and

[19] 28 *Harvard L.R.* 806.

take" applies. The liability is limited, apart from wilful misfeasance, by the possibility of control. No liability without foreseeability. In the case of nuisance caused by business or industry, foreseeability-duty is implied from the position of control. In cases of nuisance arising on land, it will be determined on the circumstances of the case.

2. The sphere of the rule in *Rylands* v. *Fletcher* now completely overlaps with that part of negligence which deals with the responsibility of manufacturers or other persons whose use of property may injure a member of the public. This has been achieved, on the one hand, by making the elements of the rule in *Rylands* v. *Fletcher* flexible and adaptable to new conditions. and by tainting them with conceptions of modern negligence, and, on the other hand, by transforming negligence—in the type of cases discussed here—into a liability in the nature of insurance and arising from control of business, or premises. *Shiffman's* and *Wilchick's Cases* could have been decided on *Rylands* v. *Fletcher* just as well as on negligence.[20] We might go further. Why should the sealed and opaque ginger bottle of the Snail case not be a *Rylands* v. *Fletcher* object, and could the same not even be assumed about injurious undergarments, amusing as it might be to think of them as of things likely to do mischief if they escape? If so, *Donoghue's Case* or *Grant's Case* could also have been decided on *Rylands* v. *Fletcher*, and this rule becomes in fact, as Stallybrass contends in *Salmond*, (9th ed., sec. 149) a branch of modern negligence, or, in other words, superfluous. But even if it were too early to draw such sweeping conclusions, the line of development seems clear.

This whole development is mainly due to the following factors:

(*a*) The transformation of the thing dangerous in itself into a situation, which becomes one element in determining the standard of duty. The duty itself is, to an increasing extent, implied from a certain social position.

(*b*) The extension of liability for independent contractors.

(*c*) The mitigation of strict liability by introducing into it the test of foreseeability.

(*d*) The extension of negligence by the application of *res ipsa loquitur*.

(*e*) The disappearance of the original limitation of the rule in

[20] Perhaps, in *Wilchick's Case*, the defence of natural user might have been successful against a *Rylands* v. *Fletcher* claim. But it is doubtful whether a defective shutter forms part of a "natural user" of the property. *Rickard's* and *Collingwood's Cases* suggest that only such dangers as are incidental to the use which is considered as "natural" or "to the common benefit" form part of it. This is, in fact, not very different from the criterion of "reasonable care" and shows again how the modern conception of negligence subtly transforms the interpretation of older, once differently conceived, forms of action.

Rylands v. *Fletcher* to neighbouring landowners, and its gradual extension to interference with any right, whether proprietary or personal.

The reader will have observed that the lines of distinction drawn in this article do not altogether coincide with the usual divisions between the various torts. The actions of negligence and *Rylands* v. *Fletcher*, with all their ramifications (such as liability for dangerous things or for fire) clearly belong to the type of liability studied in this essay. But the various and not homogeneous kinds of liability comprised in the action of private nuisance, belong partly to this group and partly to that of torts determined by the injured right (like trespass).

In a system of predominantly judge-made law, legal science must proceed cautiously in any attempt to systematize and generalize. But where the raw material of rationalization and simplification lies about, contained in hundreds of decisions, which indicate clearly enough the line of development, legal science must bring order into the material. In the English Law of Torts, rationalization has now gone far, within the individual forms of action. But co-ordination is still lacking, with the result that there is an abundance of forms of action once clearly distinguished and with different objects, but now largely coinciding or intersecting, and, thereby, creating unnecessary confusion.

It would be premature to suggest one general formula of tortious liability, on the pattern of German, French or Swiss Law. On the other hand a co-ordinating view of modern judicial development would seem to suggest the following principal groups of torts:

(*a*) Torts determined by the injured right (trespass, conversion, defamation, quasi-proprietary rights).

(*b*) Torts determined by a responsibility arising from duty based on a special social relation.

(i) as between individuals (collisions, accidents, individual negligence in general).

(ii) as between those in control of property and a member of the public injured by the use of such property.

(iii) as between those in control of property and persons using the property as visitors or in some relation other than employment.

(iv) as between employers and employees.

(This last category is rather distinct from all other tortious liability and may eventually become part of the Law of Contract or of Social Insurance.)

W. Friedmann.

STATUTES

Declaration of Abdication Act, 1936

The abdication of King Edward VIII was accomplished in law by giving statutory effect to the Sovereign's declaration of abdication and by a consequential amendment of the Act of Settlement designed to exclude King Edward, his issue and descendants (if any) from the succession to which they would be entitled if that Act was not amended. But this simple measure raised in an acute and unexpected form difficulties with regard to the mode of achieving legislation designed to have inter-Imperial validity within the British Commonwealth. Moreover, the events which preceded its enactment shewed that the machinery for co-operation between the United Kingdom and the Dominions was by no means certain in spite of, or perhaps because of, the Statute of Westminster. These events have not left it entirely clear what constitutional conventions govern consultation between the United Kingdom Prime Minister and his colleagues in the Dominions. But we are concerned here with the Abdication Act itself. It will be remembered that the Statute of Westminster recites in its preamble that

> "it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom."

Accordingly His Majesty's Government on 10th December communicated the Instrument of Abdication to the Governments of the five Dominions, who had already received from Mr. Baldwin informal intimation of His Majesty's intentions; while at an earlier stage to quote Mr. Baldwin: "enquiries had gone far enough to shew that neither in the Dominions nor here would there be any prospect of legislation enabling the King to marry without conferring the position of Queen upon his wife being accepted." It would seem then that no reliance was placed upon the technical plea that the contents of the preamble are outside the operative parts of the Statute. To the constitutional lawyer it is interesting to note how effect was given to "the established constitutional position" by the various members of the Commonwealth. The Declaration of Abdication Act contains the following preamble—

> "And whereas, following upon the communication to His Dominions of His Majesty's said declaration and desire, the Dominion of Canada pursuant to the provisions of section four of the Statute of Westminster, 1931, has requested and consented to the enactment of this Act, and the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa have assented thereto."

Canada, alone of the Dominions, requested and consented to the enactment of the United Kingdom Statute. This is in accordance with sect. 4 of the Statute of Westminster which reads as follows—

> "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a

Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."

Why did Canada alone expressly request and consent to the measure which she did by Order in Council, though the Dominion Parliament has since given its approval to the alteration in succession to the throne? So far as the Commonwealth of Australia and the Dominion of New Zealand are concerned, neither has yet adopted sect. 4 of the Statute of Westminster, though the preamble, for what its legal effect is worth, is binding upon them. Neither apparently desired to assert its constitutional right to legislate upon this topic rather than to accept the United Kingdom Statute as being binding. What actually happened in Australia was that the Commonwealth Parliament met and passed resolutions of assent contemporaneously with the enactment of the Abdication Act at Westminster on 11th December. In New Zealand no such step was taken. It is in accordance with established constitutional principle that a Dominion to which the Statute of Westminster has not become applicable should merely assent to action by the United Kingdom Parliament, as the foregoing provision in the preamble to the Abdication Act shews.

Of the two newer Dominions, the Union of South Africa, it will be observed, merely gave its assent, as distinct from its request and consent pursuant to sect. 4 of the Statute of Westminster, which in the case of this Dominion is in operation. This is in accordance with the constitutional law of the Union. Sect. 2 of the Status of the Union Act, 1934 (Union Statute) prevents the operation of Imperial legislation in the Union until it has been enacted by the Union Parliament, even when, as here, the language of the United Kingdom Statute is to be adopted. Accordingly the Union Parliament subsequently passed its own Act recognising the change of Sovereign and incidentally recognising the Abdication as taking effect from 10th December, the date of His Majesty's Instrument of Abdication, and not from 11th December, the day on which Royal Assent was given to the United Kingdom measure as the last act of King Edward VIII. Moreover, the Union Act received the assent of the Governor General, acting on behalf of King George VI and not of King Edward; this is in accordance with sect. 5 of the Status of the Union Act which defines the King's heirs and successors to the Sovereignty of the United Kingdom as determined for Union purposes by the law relating to the succession to the Crown in the United Kingdom. This provision incidentally gave legal validity to the proclamation of the new King in the Union upon his accession, notwithstanding that some weeks elapsed before the Union Parliament passed its Abdication Act.

The Irish Free State is not mentioned in the United Kingdom Abdication Act. Its Government did not assent to the legislation, but acting independently, it is understood, both of the United Kingdom Government and of the Governments of the other Dominions, passed two measures in the Dail Eireann, namely, The Constitution (Amendment No. 27) Act, 1936, and Executive Powers (External Relations) Act, 1936. By the first of these measures the office of Governor General is abolished and the Crown is eliminated for purposes of internal government. The second measure recognises the Crown in the person of King George VI and his successors for external purposes, so long as the British Commonwealth of Nations continues in its present form. Thus the King will continue to play a part

in the foreign affairs of the Irish Free State acting, it appears, on the direct advice from Free State Ministers, and the Free State remains a member of the Commonwealth bound by the convention which requires inter-Imperial consultation in foreign affairs.

It was only to be expected that Mr. de Valera should take the opportunity afforded him by the abdication of eliminating the Crown from the internal government of the Free State, thus achieving the plan which he favoured in 1921. But actually an earlier constitutional amendment, the Irish Nationality and Citizenship Act, 1935, had already severed the bond of allegiance in the case of Free State citizens, and the disappearance of the Crown from internal government in 1936 is of little but sentimental significance.

There is no doubt that acceptance, as binding constitutional practice, of the preamble to the Statute of Westminster regarding alterations in the succession to the throne added to the embarrassment of King Edward VIII, his Successor and His Majesty's Governments throughout the Commonwealth in the difficult decisions of December, 1936. As it is, only two Dominions, Canada and South Africa have given assent through their Parliaments as required by the preamble to the change of Sovereign. The action of the Irish Free State can hardly be said to be in accordance with "the established constitutional position of all the members of the Commonwealth in relation to one another." Australia and New Zealand acted as they would have done, had the events occurred prior to 1931.

E. C. S. W.

Regency Act, 1937

Constitutional lawyers have long been conscious of the need for legislation upon the subject of a Sovereign's partial or total incapacity from infirmity of mind or body. But hitherto there has been no general legislation dealing with such an emergency. On the other hand, Parliament in the past has made provision on several occasions for the accession of a particular heir to the throne, who may be under 18 years of age, as in the Regency Act, 1910. Such provision was essential, for the King has hitherto been immune from the ordinary incapacities of infants up to the age of 18. It is, however, necessary to go back as far as Edward VI for the only Regency Act which became operative upon the accession of a minor.

The Act of 1937, unlike its predecessors which have dealt only with the contingency of the accession of a particular minor, is of general application and also extends to incapacities other than infancy. Its object is to make general provision for (i) a Regent taking office on the accession hereafter of any Sovereign who may be under the age of 18, (ii) for a Regent to supersede a Sovereign who is totally incapacitated, thus seeking to avoid the difficulties which occurred in the later years of George III's reign, (iii) for the delegation of royal functions to Counsellors of State in the event of an illness of the Sovereign not amounting to total incapacity. The last named provision was achieved without legislation in 1928–29, as well as on the last day of King George V's life.

Thus infancy becomes for the first time a general statutory disability in the case of a Sovereign who is under the age of 18. His place is to be taken by the person who is next in succession to the Crown, as also is the case in the event of total incapacity. The disqualifications imposed by the Act of Settlement operate to exclude a Regent from office in the same way as they have hitherto done with the Sovereign. A Regent is to take no

part in the decision whether total incapacity of the Sovereign has arisen: that decision is entrusted to the following persons, or any three of them—the wife or the husband of the Sovereign, the Lord Chancellor, the Speaker of the House of Commons, the Lord Chief Justice of England, the Master of the Rolls. This body of persons is to declare in writing that it is satisfied by evidence which shall include the evidence of physicians, that the Sovereign is by reason of infirmity in mind or body incapable for the time being of performing royal functions. A Regent may also be appointed in similar manner if the same body is satisfied by evidence that the Sovereign is for some definite cause not available for the performance of those functions.

The provisions for the appointment of Counsellors of State follow the well-known precedent of 1928–29, save that the Counsellors must be the wife or husband of the Sovereign (if the Sovereign is married) and the four persons, who subject to certain disqualifications, are next in the line of succession to the Crown. The objection of the Dominions to the Counsellors of State including United Kingdom Cabinet Ministers as they did in 1928–29 is thus met, as it was in the appointments made on the 20th January, 1936, by the dying King.

The Lords Justices Act, 1837, is repealed. This Act made provision for Vice-Regents in the case of the successor to Queen Victoria being out of the realm at her death, and there was some doubt as to whether the Act remained in force.

A feature of the Regency Act is the absence of any reference to the Dominions, save that a declaration of total incapacity has to be communicated to the Dominion Governments and to the Government of India. Since the Act does not alter the succession to the throne, there is in this omission no violation of the constitutional convention for joint action expressed in the preamble to the Statute of Westminster. It was this preamble which caused some embarrassment at the time of the abdication last December. But the Regency Act clearly has not the force of law in those Dominions where sect. 4 of the Statute of Westminster applies—

> "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."

Presumably political considerations made it undesirable to seek the consent of all the Dominions to the enactment of the Regency provisions, though no doubt there will be general, though not universal, reciprocal legislation on the part of the Parliaments of the Dominions, should the necessity arise. This is a matter upon which light may be thrown at the Imperial Conference, 1937.

E. C. S. W.

REPORTS OF COMMITTEES

Fixed and Flexible Trusts

Perhaps the most important commercial development of the last few years has been the growth of Fixed and Flexible Trusts. Not only have these great economic and social importance, but they are also of absorbing interest to the lawyer and jurist, since they represent a fusion between the "Trust" and the "Corporation" which hitherto have operated largely (though by no means completely) as two mutually exclusive methods of enabling property to be conveniently enjoyed by a fluctuating body of persons. The basic principle of these Trusts is simple. The "Managers" of the Trust (generally a private limited company) purchase a block of various investments and vest them in trustees (in practice, a trust corporation) to be held upon the terms of a trust deed. This divides the investments into a number of aliquot shares which are in the first instance held on trust for the Managers, who then sell them to the public at a price based upon the value of the investments together with the cost of acquisition and a further small charge for service and to give a profit to the Managers. The latter have power to increase the number of aliquot shares by vesting in the Trustees additional investments. If the panel of underlying investments (the "portfolio") is fixed and certain or only variable subject to very rigid conditions, the Trust is described as a "Fixed Trust." In this event the first panel is said to constitute one or more "units" and the aliquot shares that are sold to the public are described as "sub-units." In this event, the Managers add to the Trust by vesting in the Trustee from time to time one or more additional complete units each of which is divided into the same number of sub-units. It will be seen that in a Fixed Trust the investor knows exactly what he is getting, i.e. a beneficial interest in a fixed block of investments. The modern tendency, however, is in favour of the Flexible Trust in which the Managers have power to vary the nature and proportions of the underlying securities either within defined limits or to an entirely unrestricted extent; here it is impossible to divide the investments into units and the aliquot shares offered to the public are themselves described as units. In this case the Managers add to the Trust by vesting in the Trustees sufficient investments or cash to cover the units from time to time sold by them. In both Fixed and Flexible Trusts, while the Managers continue to add to the underlying investments and both to buy and sell units or sub-units (as the case may be), the Trust is said to be "open." When they cease to add to the Trust and no longer sell (sub-)units, the Trust is said to be "closed" and it is gradually "unwound" as the Managers buy back (sub-)units and realise the underlying investments representing them. Whether open or closed the Trust continues in existence until all the underlying investments are sold and the period of its existence is generally specified in the original trust deed. Both Fixed and Flexible Trusts have the advantages, so far as the investor is concerned, of simplicity and of spreading the risk of depreciation over a variety of investments. For this reason they appeal chiefly to investors who wish to avoid trouble and who have only a small sum to invest and accordingly would be unable to secure the advantage of a spread investment by a direct purchase of shares. The Fixed Trust has the further advantage of certainty, but the disadvantage that depreciation cannot be

avoided by the adroit sale of falling investments and the purchase of those that are rising. The Flexible Trust avoids this last disadvantage, but as a necessary consequence causes the investor to be dependent upon the financial integrity and skill of the Managers. A completely flexible trust is for practical purposes an ordinary Investment Trust Company with the advantages that the unskilled investor knows that he is obtaining Units at a price which bears a close relationship to the value of the underlying investments and that he can generally buy and sell without difficulty, but with the disadvantage that he is not a shareholder in a company and has no control over the Managers and none of the protections which the Companies Act affords a shareholder.

Hitherto, the advantages have been much more apparent than the disadvantages, owing to the fact that these Trusts were first introduced into England from America in 1932, and since that date the stock market has shown a continual rise in prices. It was felt, however, that these Trusts had pitfalls which would become apparent so soon as prices commenced to fall; pitfalls which might have grave social consequences since, as previously pointed out, these Trusts appeal particularly to small investors who can ill afford to imperil their meagre savings. Accordingly in March, 1936, the President of the Board of Trade appointed a strong Committee to investigate this question and this Committee delivered their report with exceptional and commendable promptitude in July, of the same year. A Bill is at present in preparation to give effect to their recommendations.

The Report (Cmd. 5259 of 1936, price 1s.) is universally admitted to be an admirable one, though details of its recommendations have not escaped criticism. It is a document of 46 pages with 12 pages of appendices and can here only be shortly summarised. After defining and dealing with the history of these Trusts, it summarises the criticisms and dangers of the movement under the following 10 heads—

(i) *Propaganda and advertisement.* It is pointed out that much of the advertising misleadingly suggests that the capital and income of the investor is completely secured. Further, the name of the Trustees (some well-known bank of insurance company) is invariably printed in large type, thus suggesting to the uninitiated that the Trust is controlled by them. In fact, the real control is invested in the Managers, who are generally a private company with small financial resources, and the relationship between them and the Trustees is somewhat similar to that existing between managing and custodian trustees in an ordinary trust.

(ii) *The dual role of Management Companies.* These double the parts of confidential agents (almost trustees) of the investors, and principals who stand to gain or lose.

(iii) *Method of fixing selling prices,* and (iv) *Buying back of units.* The statement of these often lacks precision and the investor is often largely in the hands of the Managers.

(v) *Service charge out of capital.* The practice of collecting charges of management in a lump sum instead of out of yearly revenue is open to criticism.

(vi) *Absence of responsibility of Management Companies to the (sub-) unit holders and lack of control by (sub-) unit holders.*

(vii) *Excessive commission to brokers.*

(viii) *Market dangers of automatic selling and buying.*

(ix) *Exercise of voting rights.* This is generally vested in the Managers and neither the Trustees nor the (sub-)unit holders have any control.

(x) *Taxation.* The Trusts are here in a favourable position as compared with companies.

Despite these criticisms the Committee consider that such Trusts have justified their existence as offering to the small investor facilities which he did not previously enjoy. They make, however, a number of detailed recommendations for legislation to obviate these disadvantages. In general it may be said that these recommendations are designed to assimilate Trusts to limited companies and to apply to the former provisions similar to those which the Companies Act applies to the latter. Thus they recommend that Trusts shall be registered in a public register and certain documents filed with the registrar, and that the provisions of the Companies Act protecting subscribers and shareholders shall be applied to Trusts. They also suggest that so far as consonant with commercial treaties the management of Trusts shall be confined to bodies incorporated in the United Kingdom and that these shall be required to deposit a substantial sum with the Paymaster-General. This recommendation, and particularly the suggestion that it shall apply within limits to existing Trusts, has not escaped criticism. It is also recommended that provisions shall be made to see that Trustees have a definite and substantial financial standing. There are detailed recommendations relating to accounts, both of the managing company and of the Trust itself. The recommendation that the Trust accounts should show the exact amounts of the assets in the portfolio at the end of the accounting period has been criticised on the ground that it would hinder the profitable realisation of the investments at the end of the trust period if stock-jobbers were able to ascertain that large blocks of certain investments would be thrown on the market at a particular time. This disadvantage could be largely avoided by providing that such accounts should only be required to show the proportions which each investment bears to the total value of the portfolio, but this is, of course, less satisfactory to the investor.

Further recommendations relate to indemnities given to Trustees and Managers by the Trust Deed and include a suggestion that a provision similar to sect. 152 of the Companies Act, 1929, should be made applicable to Managers. It is urged that certain provisions in the Trust Deed should be made compulsory, the most important of these being designed to secure the transferability of (sub-)units. Other recommendations relate to the compulsory inclusion of certain information in offers for sale; to the filing of copies of advertising circulars with the registrar; to auditors; to stamp, capital and settlement, duties; and to liability for false statements in advertisements. Of particular importance are the recommendations relating to the proposed power of (sub-)unit holders to call meetings of holders and to the powers of such meetings.

A convenient summary of all the Committee's recommendations will be found at pages 43–45 of the Report, which, however, repays the most careful study in its totality by all interested in law, economics or sociology. It is to be hoped that its suggestions will be embodied in legislation coming into force before a fall in market prices reveals in practical and, it may be, disastrous form the undoubted dangers to which the movement is subject in its present state.

L. C. B. G.

Scottish Marriages

The Departmental Committee, appointed under the Chairmanship of Lord Morison, to inquire into the Law of Scotland relating to the constitution of marriage (1937, Cmd. 5354, 6d.), reaches the frank conclusion that: "the present Scottish law of irregular marriages is unprecedented in the countries of Europe . . . the law which permits a marriage to be contracted by a man and a woman without any intimation or ceremony or procedure is indefensible" (p. 15). Among the reasons for this view is the fact that an irregular marriage "opens a wide door to seduction, deceit and fraud and many other evils" (p. 15). Moreover, the existence of forms of irregular marriage is bound to lead to uncertainty with regard to the legality of many marriages and the legitimacy of many children (p. 13). Registration of irregular marriages is not essential.

Hence the committee recommends the abolition, as from a fixed date, of the forms of irregular marriage (p. 16), all of which are based on the principle that present consent makes marriage (p. 7), i.e. (1) marriage by a declaration *de presenti*, the Gretna Green type of marriage which requires no particular form or ceremony or any consummation (p. 5), (2) marriage by promise *subsequente copula*, the validity of which is the subject of some controversy (p. 12), (3) marriage by habit and repute.

As a temporary measure it is recommended that the sheriff be given power, on the application of *any interested party*, to declare the validity of an irregular marriage contracted before the fixed date, *upon being satisfied* that the parties had the necessary capacity and qualification at the date of the alleged union. This would be an advance upon the existing practice which allows the *parties to a marriage*, together with two witnesses, to take certain oaths before the sheriff and thereupon to obtain registration of the marriage without further inquiry on the part of the sheriff (p. 7).

It is indeed astonishing that irregular marriages should have survived until the present day. Lord Hardwicke's Act abolished clandestine marriages in England in 1753, and the Decree of the Council of Trent, which altered the Roman Canon Law in 1563, required marriages to be celebrated *in facie ecclesiae* and before two witnesses (Rayden on *Divorce*, p. 40; Cheshire, *Private International Law*, p. 245; see now Canons 1094, *et seq.* of the Roman Canon Law, which, however, provide for certain exceptions). What is more surprising, to an English lawyer, is that Scotland should have no complete system of registration of marriages, whereas England has long enjoyed a complete system of registration, which, because of its centralization, is superior even to the French system of *état civil*, which is not centralised. (Amos and Walton, *Introduction to French Civil Law*, p. 32.)

Side by side with the system of irregular marriages, Scotland has had a system of regular marriages which, like that of the system of the Council of Trent, must be "celebrated by a minister of religion before at least two witnesses after due publication of banns, or after the statutory notice to the Registrar has been given in the terms of the Marriage Notice (Scotland) Act, 1878" (p. 6). So far as this kind of marriage is concerned the committee proposes (p. 15) that the power to proclaim a marriage and to issue banns be now conferred on ten principal Christian Churches and the Jewish Church, in Scotland. It is suggested too that notices of marriage issued from Registrars in England and Ireland should prevail in Scotland, where

one of the parties to a marriage is ordinarily resident in England or Ireland (pp. 7 and 16).

For those who do not wish for a religious ceremony of marriage it is recommended, "that a new form of civil marriage be introduced in certain populous districts in Scotland in which the Sheriff substitute, or certain Registrars specially authorised for the purpose, may conduct and carry through a marriage contracted by qualified persons after due compliance with the provisions of the Marriage Notice (Scotland) Act, or such modifications thereof as may, in special cases, be fixed by Parliament" (pp. 14 and 16).

No parental consent to marriage is required by the Law of Scotland, and in this respect the only change proposed (pp. 5 and 16), is that where a Scottish minor proposes to marry a foreigner, and the law of the foreigner's domicil invalidates a marriage contracted without parental consent, the consent of the minor's parent or guardian should be required. (English law does not invalidate such a marriage: Vol. 16, Halsbury, p. 584.) This, like the other recommendations, is eminently reasonable, but it may require further elaboration so as not to be expressed to be limited to "Scottish minors," there being as yet no Scottish nationality.

Lastly, there is a proposal to put an end to the scandals of the Gretna Green marriages. It is recalled that Lord Brougham's Act of 1856 provided "that it was necessary for the validity of any marriage contracted in Scotland, that one of the parties should either have his or her usual place of residence there at the date of the marriage, or have lived in Scotland for 21 days next preceding such marriage." This established a limitation on the rule of private international law that forms and ceremonies are governed by the *lex loci celebrationis*, and indeed, until 1856, as Cheshire says (p. 241), "the validity of the union contracted before the village blacksmith and his assistant by runaway English couples, within a few minutes of crossing the border, was consistently upheld."

No alteration is proposed in respect of Lord Brougham's Act, and the abolition of irregular marriages should take away the real danger of Gretna Green marriages. The report of the Committee (p. 8–11) gives an account of the blacksmith's shop marriages. One owner of the establishment is reported to have received as much as £1500 a year from the marriages and entry fees (p. 9) and, "in 1932, the Valuation Court held it proved that the income from visitors' fees and charges amounted to over £2000." The report continues, "these marriages have given rise to a large number of complaints and questions which were proved to us by the evidence of local ministers, the Sheriff Clerk of Dumfriesshire, the Registrar of Gretna and others," and some hard cases are cited. Consequently the last recommendation of the Report runs—

> "That in order to prohibit the traffic in marriages such as takes place at Gretna, penalties be imposed on all unauthorised persons who profess to attempt to conduct marriages or marriage ceremonies."

B. A. W.

NOTES OF CASES

Contract—Illegality—Price-fixing Agreements

Berg v. *Sadler and Moore*, [1937] 1 All. E.R. 637, is of considerable interest for both the issues directly raised and those less obviously involved. The Tobacco Trade Association is an organisation of wholesale and retail vendors of cigarettes, tobacco and snuff, which seeks to prevent "price-cutting" and maintain a system of fixed prices. Traders agree before receiving supplies not to sell below the maintained prices. If they depart from this agreement or refuse to agree, they are placed on a list of "cut-price" retailers from whom members of the Association have agreed to withhold supplies. Berg was expelled from the Association and placed upon this list, and finding himself unable to obtain cigarettes directly, resorted to the device of obtaining them through an intermediary, Reece. Berg gave Reece £72 10s. and commissioned him to order cigarettes from Sadler and Moore, to whom Reece paid the money without disclosing that he was purchasing for Berg. Moore's suspicions, however, were aroused, and on ascertaining the true facts he refused to supply the cigarettes or return the money. Berg then issued this writ for return of the money. Macnaghten, J., held ([1936] 2 All. E.R. 456) that Berg's conduct amounted to an attempt to obtain goods by false pretences with intent to defraud, that the money was paid as an incident of the commission of the crime, and that therefore no action could be entertained for its recovery. The Court of Appeal has affirmed this decision.

For Berg it was argued: (*a*) that there were no false pretences; (*b*) that he needed no aid from the illegal transaction in order to establish his claim; (*c*) that the money was not to be used for an illegal purpose—it was paid for the supply of cigarettes; (*d*) that "even assuming there were false pretences, the defendants cannot retain this money. The Court has never held that where money has been paid upon a consideration which, so far as the payee is concerned, is lawful and is not in any sense immoral or contrary to public policy, the plaintiff is debarred from recovering because some circumstance in his conduct may be questionable. The true principle behind the decisions is not a desire to punish a wrongdoer, but a refusal to assist in the enforcement of a wrongful promise." (Counsel's argument as reported at p. 638.)

The Court of Appeal rejected all these arguments. (*a*) There were false pretences. Clearly, Sadler and Moore would not have supplied Berg, and Berg knew this. If Berg secures Reece's assistance in the purchase of supplies it is falsely pretended that the purchase is by and for Reece. (*b*) Berg's claim was for money had and received on the total failure of consideration, and in order to establish this claim he must allege and rely upon the contract under which the money had been paid. In doing so he would have to disclose his crime and the Courts refuse assistance to a wrongdoer. (*c*) The money was the instrument of the fraud, just as the lease was in *Alexander* v. *Rayson*, [1936] 1 K.B. 169. (*d*) It does not matter that the illegality is on the part of the plaintiff only. It is still true in these circumstances that if he attempts to recover anything he has paid, *potior est conditio possidentis*.

An attempt was made to argue that the illegal purpose had been wholly abandoned before even partial performance, so that recovery of the money

was possible within the principle discussed in *Kearley* v. *Thomson* (1890), 24 Q.B.D. 742, and *Taylor* v. *Bowers* (1876), 1 Q.B.D. 291. The Court of Appeal held, however, that payment of the money here was itself a partial performance of the illegal object, and that in any case discovery of the offence so that the plaintiff's purpose is frustrated does not amount to total abandonment of that purpose.

The reports abound with cases in which both parties to a contract have participated in its illegal object, but cases in which the illegality is attributable to one party only are comparatively rare. It is clear from the decision that the consequences of illegality attach not only to contracts for the commission of an unlawful purpose, but also to contracts *ex facie* for the commission of a lawful purpose but tainted or induced by illegality on one side only. This is no mere academic distinction. Where the parties seek the performance of an illegal project neither can successfully maintain an action upon the contract, but where the illegality is that of the defendant only and the plaintiff is neither party nor privy to it, the parties would appear not to be in *pari delicto*, so that there is no reason why the plaintiff could not proceed upon the contract. Thus, if the defendants in this case had remained unaware of Berg's connection with the contract and had supplied the cigarettes without being paid, it is suggested that they could have successfully maintained an action against Berg as the undisclosed principal.

The case involves yet another price-fixing scheme, and it is perhaps time to consider the interrelation of law and economics with respect to price-fixing. As to the law, it appears that there are two main obstacles to the enforceability of a price-fixing scheme—the Common Law doctrines as to restraint of trade and privity of contract. The danger that conspiracy may be invoked as an objection has been almost wholly obviated by *Sorrell* v. *Smith*, [1925] A.C. 700, in which it was decided that if the purpose of a combination is the protection of its trade, it will not be liable in tort, unless unlawful means were employed to secure compliance with its design. So far the restraint of trade objection has not proved a serious hindrance. It has been said by Lord Moulton (*North Western Salt Co.* v. *Electrolytic Alkali Co.*, [1914] A.C. 46) that price-fixing is not *prima facie* in illegal restraint of trade, and by Lord Hanworth, M.R. (*Palmolive* v. *Freedman*, [1928] Ch. 264), that very little evidence is necessary to establish its legality. In practice reasonableness in the interests of the parties is the test adopted by the courts, and it is of interest to note that in the opinion of Lord Parker (*A.G. of Australia* v. *Adelaide S.S. Co. Ltd.*, [1913] A.C. 781), mere intention to raise prices is not sufficient proof of intention to injure the public. (See Kaplan, *Functional Analysis of the Law relating to Restraint of Trade*, Bell Yard (1936), No. xvii, pp. 3–20.) In applying this test the Court of Appeal pointed out in *Palmolive* v. *Freedman* that although the plaintiffs were the sole wholesalers of the soap in question, retailers and members of the public could still purchase other brands. It was also said that there was no attempt to control the output of an indispensable product such as coal or salt, that the plaintiffs were unlikely to fix an unreasonable price and that the soap would find its own price level in view of the competition offered by other brands. These considerations do not apply to *Berg* v. *Sadler* since the Association is the sole source of supply of all important brands of cigarettes and tobaccos. The principle that only the parties to a contract may sue upon it has been the most effective obstacle to price-fixing. It was responsible for the collapse of the price-fixing

system in *Dunlop* v. *Selfridge*, [1915] A.C. 79. But the courts have evolved subsidiary doctrines, the net effect of which is that a certain amount of indirect protection is available for price-fixing schemes even where all the traders to be affected are not parties to an agreement designed to maintain prices. It has been held that a trader who refuses or fails to sell at the maintained prices may be placed upon a "stop-list" by an association of which he is not a member, even though apparently the effect is to cut off all supplies. (*Ware and De Freville* v. *Motor Trade Association*, [1921] 3 K.B. 40.) It has further been decided that such an Association may demand money from the trader in lieu of the exercise of the right of placing him on the stop-list. (*Hardie and Lane* v. *Chilton*, [1928] 2 K.B.—the House of Lords has now upheld the accuracy of this in *Thorne* v. *Motor Trade Association*.) From *Berg* v. *Sadler* it appears that if a "stop-listed" trader attempts to undermine the effectiveness of a price-fixing system by obtaining supplies in the manner adopted by Berg, he will be guilty of a criminal offence. It is submitted that the full potentialities of *Lumley* v. *Gye* (1853), 2 E. & B. 216 have not yet been exploited for the purpose of preventing interference with a price-maintenance scheme. (See Lauterpacht, *Contracts to Break a Contract*, L.Q.R., 1936, p. 494.) If a group of traders agree not to supply goods to a price-cutting retailer and he induces a breach of that contract by employing an intermediary to purchase for him from a member of the group, he commits a tort. It is submitted that the decision in *Berg* v. *Sadler* could have been arrived at via this route, had it been impossible to prove false pretences, although it would probably have been necessary then to examine the validity of the contract between the Association and the defendants. It is hardly likely that the courts will consider it a tort to induce a breach of an illegal contract.

J. G.

Contract of Guarantee

In *Trade Indemnity Co.* v. *Workington Harbour and Dock Board*, [1937] A.C. 1 the House of Lords raised, but did not answer, the question whether in a contract of guarantee the promisee is under a duty to disclose material facts to the guarantor.

While a guarantee has not generally been thought to require the full disclosure which is necessary in a contract of insurance, the law has shown unusual solicitude for the guarantor. He was given the benefit of the Statute of Frauds, and the courts have striven to accord him some protection against the principle embodied in the maxim *caveat emptor* to which a promisor is normally exposed. His special position has not, however, been clearly defined, and the dicta in the different cases are not always consistent (see Pollock, *Contract*, 10th Ed. 537). The facts of the present case in so far as they are material on this point were as follows. The Board invited tenders from a number of contractors for the enlargement of their dock. The invitations were accompanied by a document in which those proposing to tender were informed that they must make local and independent enquiries as to the nature of the ground to be excavated or built upon, and generally satisfy themselves as to all matters which might influence them in making their tenders. It was also stated in the document that the Board would not be responsible for any information obtained by the contractors except such as might be given in writing by the Clerk and Manager of the Board in reply to written requests for information.

A tender submitted by K. and R. Ltd. was accepted by the Board on

condition that they provided a guarantee for £50,000. This was furnished in the form of a joint bond whereby the Appellants, an insurance company and K. and R. Ltd., bound themselves to the Board for the due performance of the contract. Owing to the unexpected quantity of water which the contractors had to contend with, they were unable to complete their contract, and thereupon, the Board sued the Insurance Company on their bond. Lawrence, J., held that the contract was one of guarantee and not of insurance, but that as the Board had innocently misled the contractors in respect of the water which would have to be dealt with, the guarantee was unenforceable. The Court of Appeal, however, held that no misrepresentation had been made, and also rejected the plea of non-disclosure. In the circumstances it was necessary to decide whether there exists in the case of contracts of guarantee a duty to disclose material facts, which does not exist in the case of ordinary contracts, and there appears to have been a difference of opinion among the Lords Justices on this matter. (See *per* Lord Atkin at p. 14.) Since the House of Lords agreed with the Court of Appeal that the facts of this case negatived the breach of any alleged duty to disclose, it did not proceed to determine this question. Lord Atkin, in his opinion, which was accepted by the other members of the House, contented himself with stating the problem. "There may be a question," he declared, "whether in the formation of a contract of guarantee there is an obligation on the promisee to make a disclosure of material facts which would not exist in the formation of an ordinary contract." He then observed that there are two views as to the nature of this duty. According to one view, it is a positive duty to disclose material facts, while according to the other view, which is the one commonly adopted in the text-books, there is implied a representation that the transaction to be guaranteed has no unusual characteristics of which the guarantor is not aware.

D. J. Ll. D.

Quasi-Contract—Quantum Meruit

The decision of the Court of Appeal in *Craven-Ellis* v. *Canons*, [1936] 2 K.B. 403 may well be found to be of far greater significance than appears at first sight. It will depend on the use made of it in future decisions whether it is a landmark in the history of Quasi-Contract. The language of the learned Lord Justices hardly suggests that they were aware of giving a decision of such importance. They decided that the plaintiff, who had made a contract with his co-directors professing to act on behalf of the defendant company, but in fact unqualified to be directors and therefore unauthorised, could sue on a count for *quantum meruit* as remuneration for services given under the contract to the company, although the contract was void, and the plaintiff could not, therefore, claim under the contract for the agreed remuneration. The underlying idea in the judgments of Greer and Greene, L.JJ., was undoubtedly that of unjustified enrichment. The defendant company had accepted the valuable services of the plaintiff and should not be allowed to profit of a technicality to have them for nothing. The only legal difficulty which the court found was that of distinguishing *In re Allison, Johnson & Foster*, [1904] 2 K.B. 327, where services had been rendered under similar circumstances, on the erroneous assumption of both parties that the company was in liquidation. Greer, L.J., in criticising a dictum of Kennedy, J., in that case, said that where services were performed in pursuance of a supposititious agreement, there was no inference of fact of a promise of *quantum meruit*, but an inference

of law, and Greene, L.J., expressly concurred. But this judgment undermines, if it does not directly contradict, the far greater authority of *Sinclair* v. *Brougham*, [1914] A.C. 398. That celebrated decision, given at the height of positivist jurisprudence, when dislike for "Natural Justice" was greatest, is supposed to have finally killed Lord Mansfield's attempt to introduce a general equitable obligation of unjustified enrichment. ("That vague jurisprudence sometimes attractively styled justice between man and man," Lord Sumner in *Baylis* v. *Bishop of London*, [1913] 1 Ch. 127.) The strongest argument of the House of Lords was that any such remedy was *in assumpsit* and that this remedy could only apply where the law could consistently impute to the defendant at least the fiction of a promise. "The fiction becomes inapplicable where substantial law makes the defendant incapable of undertaking a contractual liability." (Lord Haldane, at p. 417.) Now it can be said that in *Sinclair* v. *Brougham* the borrowing of the money sought to be recovered was *ultra vires* the defendant company, whereas in *Canons* v. *Craven-Ellis* the contract was merely not binding. In the latter case the Company was capable of contracting to pay the money, in the former it was not. But the fact remains that, in *Canon's case*, the court implied an obligation to pay on precisely the same facts which clearly excluded a contractual obligation. It thereby recognised an obligation implied by the law, and neither contractual nor tortious, but resting on certain principles of justice. The existence of such a type of obligation in the Common Law, apart from the recognised actions for money had and received, the House of Lords had denied in *Sinclair* v. *Brougham* (cf. Lord Haldane, p. 415). Nor does Greer, L.J.'s, clear distinction between inference of fact and inference of law seem to accord with the more procedural view taken in *Sinclair* v. *Brougham*, and closely connecting both inferences through the common form of action (*assumpsit*). Once one recognises a quasi-contractual obligation as being different in character from either contract or tort, the *ultra vires* argument loses its force.

Modern writers have observed a "swing of the pendulum" in the principles underlying tortious liability. With all due distrust of premature generalisations, it is at least possible, that a generation which has witnessed the resurrection of Natural Law in various forms, is taking, consciously or unconsciously, an attitude different from that of the last few generations towards the principles on which Lord Mansfield based his judicial pronouncements.

W. F.

Tort—Negligence—Professional or Administrative Functions

The judgment of Lord Wright in *Lindsey C.C.* v. *Marshall*, [1937] A.C. 97, deserves special attention. Was the neglect of isolating the other patients from a patient infected with puerperal fever, in a County Hospital, whose advisers were the County medical officers, a matter of administration or an exercise of a professional medical function? In the latter case, the County Council would have escaped liability under the unfortunate doctrine of *Hillyer's Case*, [1909] 2 K.B. 820. The House of Lords decided that here the medical officers acted in an administrative capacity, i.e. as servants of the Corporation. Lord Wright said that it was not necessary to express an opinion on the correctness of *Hillyer's Case* which could be reversed by the House of Lords. It may be hoped that such an opportunity will soon present itself to the House of Lords. The modern principle

of liability in tort is more and more that of responsibility arising from control. The underlying principle is that a member of the public can hold the person (physical or juristic) liable who is in control of a factory, business, hospital. That liability must extend to all employees and servants, whatever their training. The hospital has assumed the responsibility for a doctor as for any other servant by appointing him, and the public must be able to look to the employer in case of a tort committed by any servant. To draw a distinction according to the nature of the work done means introducing a point of view which has nothing to do with the relation between the employer and the public.

W. F.

Tort—Seduction of Illegitimate Child

Beetham v. *James*, [1937] 1 K.B. 527 merely affirms the principle that the plaintiff in an action for seduction must prove that he is the master of the girl who has been seduced and that as a result of the seduction he has lost her services. It is now established beyond all doubt that the father as such has no remedy. In this case the action was brought by the girl's father for loss of services and expenses incurred as a result of her illness. The girl lived with her parents, but at the trial the painful truth emerged that although they had lived together as man and wife for 22 years they had in fact never been married. It was therefore argued for the defendant that all the services which the girl had rendered in assisting in the management of the house were rendered to the mother, so that the father could not show that loss of service which is an essential element of his cause of action. Atkinson, J., had no difficulty in deciding that the services had been rendered to the father as master of the household and since it is the master and not the father as such who recovers in an action for seduction, the defendant's arguments must fail. He quoted with approval a dictum from the judgment of Avory, J., in *Peters* v. *Jones*, [1914] 2 K.B. 781: "The moment that one appreciates that the action is based on the relationship of master and servant, and not on that of father and child, one sees that the only question for determination is, who was the girl's master at the material times?"

This principle—often so shocking to the layman—can be explained only with reference to the judicial ideas prevalent in the early days of its history. It is one of the by-products of a period in which conceptions of property had reached a stage of development absent in most other branches of the law. (See Holdsworth, *H.E.L.*, vol. viii, p. 428.) The relationship of father and heir was considered to be of a proprietary nature, largely because of the father's valuable interest in the heir's marriage. The writ of trespass was thus adapted to provide a remedy for ravishment of the heir, but as the father had no valuable interest in the marriages of his other children it was deemed that his rights over them were not proprietary in character. See e.g. *Barham* v. *Dennis* (1600), Cro. Eliz. 770, in which, however, Glanville, J., in a dissenting judgment was of the more liberal opinion that "the father hath an interest in every of his children to educate them, and to provide for them; and he hath his comfort by them; wherefore it is not reasonable that any should take them from him, and to do him such an injury, but that he should have his remedy to punish it." But since the law did not accept this view it became necessary to protect the relation of father and child by applying the remedy which protected the relation of master and servant. It is as Street says (*Foundations of*

Legal Liability, vol. i, p. 268–9) an example of the fact that legal evolution is along the line of least resistance, and that the law will prefer to adapt an old remedy rather than create a new one. The old remedy was found in trespass for battery or trespass *quare clausum fregit*, where the defendant entered without the leave and licence of the plaintiff. (*Norton* v. *Jason* (1653), H. Style 398; *Sippora* v. *Basset* (1664), 1 Sid. 225; *Russell* v. *Corne* (1704), 2 Ld. Raym. *per* Lord Holt at p. 1044.) Later it was possible to bring the action either in case or in trespass. (See note to *Postlethwaite* v. *Parkes* (1766), 3 Burr. 1878.)

Although some of the unfortunate results of the doctrine have been eliminated by the fiction of constructive service and the practice of awarding additional damages as a salve to the father's feelings, it is still capable of producing considerable hardship. Serjeant Manning's criticism is famous. "The quasi-fiction of *servitium amisit* affords protection to the rich man whose daughter occasionally makes him tea, and leaves without redress the poor man whose child is sent unprotected to earn her bread amongst strangers." The main objection, however, has been well stated by Street. "The real anomaly of the action for seduction is not found in the fact that the law here permits recovery for the parental disgrace and sorrow, but in the circumstance that the courts have continued to restrict the action within the limits of servitial relations."

J. G.

Divorce—Cross-examination—Denial of Adultery

Apparently the decision of the President in *Morton* v. *Morton, Daly and McNaught*, [1937] 2 All. E.R. 470, overrules the statement to be found in *Rayden on Divorce*, Third Edition, p. 276, that, "A party lending himself or herself as a witness for the purpose of disproving an act of adultery is not protected from being cross-examined as to other acts of adultery if these last be charged in the proceedings"; the earlier case of *Brown* v. *Brown and Paget* (1874), L.R. 3 P. & D. 198, upon which the passage was founded, went on the Evidence Further Amendment Act, 1869, sect. 3. The wording of this is slightly changed in the Supreme Court of Judicature (Consolidation) Act, 1925, sect. 198. Rather surprisingly, the argument that the 1925 Act was a Consolidation Act, and therefore not intended to change the law, was not accepted, and a wife who had been asked questions in examination in chief with regard to adultery with D, but not with regard to M., could not be cross-examined with regard to alleged adultery with M.

Nullity—Conflict of Laws

According to *The Times* of 8th February, 1937, the First Division of the Scottish Court of Session rejected an appeal from a decision of Lord Jamieson refusing a decree in an action for declarator of nullity of marriage in the case of *Macdougall* v. *Chituavis*. The petitioner contended that she was entitled to have her marriage with an Indian student declared null, on the ground of essential error as to the status and position she would have as a wife in India, and that the error had been induced by the misrepresentation of the defendant, made before the marriage. This plea, however, was abandoned and the petitioner then relied upon the plea that there had been no *consensus ad idem* to the marriage since the defendant, a Hindu, was not capable of contracting a valid marriage with her, a non-Hindu. Lord Normand, however, held that the defendant's incapacity by the law

of his domicil had not been proved, and that in any case the disability was one which the defendant could have relieved himself of by an act of his own volition.

It does not appear from the short report that the Scots Court took the point taken by the English Court in *Chetti* v. *Chetti*, [1909] P. 67, that we could not recognise a status unknown to English law, arising from caste or religion. (See also Dicey, *Conflict of Laws*, p. 531, rule 136.)

Lord Morison pointed out that the Scots law allowing divorce on the ground of desertion did not work very happily with the rule that only the courts of the husband's domicil have jurisdiction in divorce. This may be so, but we should have thought that very often the court concerned with such cases could have relied upon the presumption against change of domicil (Dicey, *op. cit.* Rule 14).

Married Women's Torts

The Law Reform (Married Women and Tortfeasors) Act, 1935, has recently been interpreted in respect of its transitional provisions. In *Re a Debtor* (No. 627 of 1936), [1937] 1 Ch. 156, the Court of Appeal (Slesser, Romer and Greene, L.JJ.) held that a married woman, who was not a trader, could not be made bankrupt in respect of a sum due under an obligation contracted before the Act. The debt was due to the guarantor under a guarantee entered into at the married woman's request before the Act was passed to make all married women liable to bankruptcy proceedings; even though the liability to the guarantor did not mature until after the passage of the Act, it was held that the Act did not affect the protection afforded to a married woman by the old law in respect of pre-Act obligations.

On the other hand in *Barker* v. *Pigden*, 53 T.L.R. 246, [1937] 1 All. E.R. 115, the Court of Appeal (Greer and Scott, L.JJ., and Eve, J.) held that the new Act is retrospective so as to exempt a husband from liability for his wife's torts committed before the commencement of the Act; the only exception occurs in the case where legal proceedings have been actually started before that date.

In each case the interpretation freed the defendant from liability; Greer, L.J., made it clear, however, in the second case (p. 121), that a retrospective effect will not be presumed in a statute; it must be clearly intended.

Separation—Maintenance

In *Hague* v. *Hague*, [1937] 2 All. E.R. 539, a Divisional Court of the Probate Division (Langton and Bucknill, JJ.) held, following *Peagram* v. *Peagram*, [1926] 2 K.B. 165, that the King's Bench had not exclusive jurisdiction to deal with appeals under the Maintenance Orders (Facilities for Enforcement) Act, 1920, and, in this case, an order of the magistrates at St. Albans confirming a South African Maintenance Order was not upheld.

The whole question of family desertion will be one of the topics for discussion arranged for "La semaine de Droit," which is to take place in Paris next July, and our inter-Dominion legislation for the mutual enforcement of maintenance orders is likely to be of considerable interest to our foreign colleagues. The writer will welcome any letters commenting on this matter.

B. A. Wortley,
Reader in Jurisprudence and Comparative Law, University of Manchester.

Trusts—Statutory Power of Maintenance

The decision of the Court of Appeal in *Re Turner's Will Trusts*, [1937] 1 Ch. 15 has put an end to the state of uncertainty which had been created by decisions of courts of first instance in *Re Spencer*, [1935] Ch. 533 and *Re Ricarde-Seaver's Will Trusts* (1936), 52 T.L.R. 508, concerning the effect of sect. 31 of the Trustee Act, 1925. The decision is also of some general importance in re-establishing a general principle with regard to the effect of the Trustee Act, considered as a whole. For several centuries, the Law of Trusts grew up outside the purview of the legislature. During the last century, however, there have been several Trustee Acts, but it has been generally assumed that the purpose of these Acts was to facilitate the working of the Law of Trusts, not to confine it within fetters. Accordingly, the Trustee Act of 1925 following the form of its predecessors, included a number of sections which may be regarded as "common form" sections. They operated only in so far as the trust instrument itself did not provide to the contrary. Is the whole of the exceedingly comprehensive maintenance section—Section 31—one of these "common form" sections, or does Clause (ii), dealing with the destination of income after the beneficiary attains his majority override any provision of the settlor to the contrary? Clause (ii), it should be noted, is, in terms, directory, but if the latter was the correct interpretation it would have followed that there was little point in setting out elaborate provisions on this point in trust deeds. The two decisions of courts of first instance, and more particularly the decision of Luxmoore, J., in *Re Ricarde-Seaver* (*supra*) seemed to suggest that this was the true interpretation. The decision of the Court of Appeal in *Re Turner* (*supra*) has now restored flexibility to the Law of Trusts in this particular. The judgment itself is particularly interesting. To set at rest all doubts, only one judgment was delivered, and it pointed out that the Trustee Act of 1925 "is a Consolidating Act and, therefore, it is unlikely that it effected any substantial change in the fore-existing law." This is a useful clue to the construction of the Trustee Act, but it has not been generally followed. For example, Maugham, J., in *Re Vickery*, [1931] 1 Ch. 572, thought that sect. 23 was a revolutionary section, but in the light of the recent judgment of the Court of Appeal it would seem that a more cautious view of sect. 23 is the appropriate one.

G. W. K.

Income Tax and Estate Duty

The Income Tax Codification Committee (Cmd. 5131–1936) at pages 69–70 of their Report commented upon the extent to which receipts from the ownership of land escaped taxation by reason of technical rules of charge which had come down almost unchanged since 1842 and recommended remedial legislation. *Lyons* v. *Collins*, [1937] 1 K.B. 353 and *Whelan* v. *Leney & Co. Ltd.*, [1936] A.C. 393, are two recent cases where income from property considerably in excess of the annual value charged under Schedule A was held not to be taxable; they may well be a spur to a Chancellor looking around for further sources of revenue. The point in *Lyons* v. *Collins* was short, viz.: did sect. 138 Income Tax Act, 1918, which in the case of an appeal against the annual value of property assessed under Schedule A enables an appellant to demand a valuation by a "person of skill," make such valuation binding on the Commissioners, or was he merely in the position of an "expert witness"? The Court of Appeal

unanimously held that the words in the section, viz.: "the annual value shall be determined in accordance with such valuation" made the valuation conclusive and prevented the Appeal Commissioners going behind it. The repercussions arising from this case seem obvious from the point of view of the general taxpayer when it is realised that the "person of skill" fixed the annual value of property let on lease at a rental of £2000 p.a. at only £1330, and this figure had to stand though the Appeal Commissioners in view of the lease and their local knowledge had fixed it at £2000. The inequity as between one taxpayer and another is obvious; an investor in stocks, mortgages, or the like has to pay tax on the full amount of income he derives, but on too many occasions the investor in property bears tax on considerably less than the income he obtains because of anomalies in the taxing code, of which this is only one example. *Lyons* v. *Collins* has another and perhaps more serious aspect in that it removes absolutely the ascertainment of the taxpayer's liability from an impartial public body—the Appeal Commissioners—to a lay "person of skill," i.e. a professional valuer whose interests may very well incline to those of the property owner. With this single exception all disputes between the Crown and the individual taxpayer are determined by the General or Special Commissioners of Income Tax subject only to an appeal to the Courts on a point of law; in *R.* v. *Special Commissioners, Ex parte Elmhirst*, [1936] 1 K.B. 487, it was emphasised that the decision of these Commissioners on appeal was a public process directed to public ends, e.g. Ld. Wright, M.R.: "They (the Commissioners) are not deciding the case *inter partes*; they are assessing the amount which in the interests of the country at large the taxpayer . . . ought to be taxed." The impropriety of removing this duty from a public body (Jennings: *Cabinet Government*, p. 435) to a private person seems obvious and we may therefore expect to see sect. 138 disappear from the statute book at an early date.

Whelan v. *Leney & Co. Ltd.*, [1936] A.C. 393, is another instance of income from property in land escaping the net of taxation; in this case a brewery company leased for a term of years all its tied houses to another such company for an average rent of £20,000 per annum; the tied houses were assessed in the aggregate under Schedule A at an average of £5500 per annum, this being the sum of the rents a hypothetical free tenant could be expected to pay (*Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q.B. 630). The House of Lords held that the excess of the rent received by the lessor over the annual values charged under Schedule A could not be subjected to income tax—following *Salisbury House Estates, Ltd.* v. *Fry*, [1930] A.C. 432, it was held that the assessments under Schedule A exhausted all liability in respect of the profits arising from the property in land so that there was no means of charging any excess. The Commissioners and Finlay, J., had held, following *Bradford-on-Avon Assessment Committee* v. *White*, that as the annual value for rating (and taxation) purposes took into account only the publican's retail trade and not the wholesale trade done by the brewer in supplying beer, the value of the tie was assessable under Schedule D, as it was excluded from any consideration of assessment under Schedule A. The House of Lords, which refrained in any way from commenting on this latter case, held that the rent was not paid partly for the land and partly for the tie affecting the licensed houses, but that as the tie and the reversion could not be disposed of separately the rent must be deemed payable wholly for the property in the land, so that the assessments under Schedule A exhausted

all liability in respect thereof to income tax. If *Robinson Bros.* v. *Houghton, etc., Assessment Committee*, [1937] 2 All. E.R. 298 (see *infra*) is upheld in the House of Lords the assessments under Schedule A will doubtless be increased, but any difference between their aggregate and the all-over rent payable in *Whelan's* case will still be without the scope of taxation unless the law is altered as recommended by the Income Tax Codification Committee.

Inland Revenue v. *Mann; Same* v. *Crossman*, [1937] A.C. 26, turned on the meaning of "sale in the open market" in sect. 7 (5), Finance Act, 1894, which lays down the basis of valuation of property for estate duty purposes. Under the articles of association of a company shares could not be sold in the open market until they had first been offered to and refused by existing shareholders at a price very considerably below their true worth; was the "value in the open market" what a purchaser would pay, knowing the shares would be pre-empted as of course by existing shareholders or, on the assumption that a true open market was possible, was it the price he would pay for them, bearing in mind the restrictions on his and his executor's right of disposal? The majority of the House of Lords adopted the latter view, approving a similar decision of the Courts in *Att.-Gen.* v. *Jameson* (1905), 2 Ir. R. 218; in arriving at the idea of a "notional open market" they were assisted by rating decisions whereby properties which could not in fact be let at all on a yearly tenancy were yet enabled to be valued at the rent a hypothetical tenant would pay. The Crown's additional contention that a still higher value should be imposed because trust companies would pay more than the hypothetical market value was rejected because the matter must be considered generally and without regard to what a particular buyer might offer for special purposes of his own; this contention was not strongly pressed, but when *Robinson Bros.* v. *Houghton, etc., Assessment Committee*, [1937] 2 All. E.R. 298, is before the House of Lords it will be interesting to see whether this dictum is applied to the case of competing brewers who are willing to offer for a tied house a rent considerably in excess of what a hypothetical "free-tenant" would pay.

A. G.

REVIEWS

PRINCIPLES OF ROMAN LAW. By Fritz Schultz. Oxford: Clarendon Press, 1936. xvi and 268 pp. **12s. 6d.**

ROMAN LAW AND COMMON LAW. By W. W. Buckland and A. D. McNair. Cambridge University Press, 1936. xviii and 353 pp. **15s.**

One may not agree with Professor Schultz when he says that "the sources for ascertaining the fundamental views and modes of thought of the Roman lawgivers are crystal clear," but one cannot fail to be stimulated by his attempt to formulate what he conceives those views and modes to be. He is interested in law, not as a separate science, but as a social institution, and the principles which he outlines are principles, not merely of the Roman legal system, but of Roman life and character as a whole. He shows the practical way in which these principles mitigated in classical times the apparent severity of legal rules and gives the reader an insight into the circumstances in which those rules operated. A glance at the list of passages cited will give some idea of the variety of evidence upon which he bases his conclusions. Professor Buckland and Professor McNair have a different object in view, for they present a brief comparison of the leading rules in Roman Law and Common Law. But incidentally they touch on many points dealt with by Professor Schultz, and there is a close resemblance between the conclusions arrived at in both books, especially those dealing with the outlook of the classical Roman lawyers. It is true that there is a difference of emphasis. Professor Schultz is concerned to indicate their dislike of Statute Law, their casuistic method of developing the law, the way they ignore public and administrative law, while Professor Buckland and Professor McNair stress the similarity of their outlook with that of the Common lawyers. But each book is, in a way, the complement of the other, and they should be read together.

Neither book will be very easy for students to use. To get the most out of Professor Schultz's work the reader must be acquainted in some detail with Roman history and literature. For instance, in the chapter on "Authority," he must understand the constitutional position in the Early Principate if he is to grasp what is meant by the *auctoritas* of Augustus. Professor Buckland and Professor McNair cover such a wide field of law that the treatment of each subject is necessarily brief; theories of possession, for example, are dealt with in little more than a page. One must come to this book with a fairly comprehensive knowledge of Roman Law and Common Law if one is to appreciate properly the comparisons and distinctions which are so brilliantly drawn. But the properly equipped reader will find both books exciting in that they enable him to view familiar material from a new angle.

A word of praise must be given to the translator of Professor Schultz's book. One would never suspect that it had been written originally in another language.

I. W. Logan.

DROIT, MORALE, MOEURS. II^e Annuaire de l'Institut International de Philosophie du Droit et de Sociologie Juridique. Rapports de: MM. G. Del Vecchio, W. Sauer, L. Le Fur, H. Kelsen, A. Goodhart,

J. Dickinson, M. Djuvara, R. Hubert, L. Recasens Siches, Simonius, M. Réglade, J. Delos, N. L. Alexeiev, M. Lazerson, S. Golab, B. Horvath et C. Tsatsos. Discussions avec participation de: MM. de la Brière, Dupasquier, Gurvitch, Kantorowicz, Koulicher, Lévi, Mauss, Peretiatkowicz, Radbruch, Richard, Tassitch, et Vycheslavzeff. Paris: Sirey, 1936. Pp. 294.

According to Sir J. J. Thomson, John Dalton, when President of the Manchester Literary and Philosophical Society sometimes contented himself after a paper had been read by saying: "This paper will no doubt be found interesting by those who take an interest in it." The reviewer of a collection of papers on "Law, morality and custom" is tempted to make the same remark. Most of the authors, among whom are several with world-wide reputations, have adhered fairly closely to the subject set for discussion, with the result that they have been forced to set out in a comparatively short compass their general credo on the nature of law, and any reasoned criticism would necessarily result in another "short study of a great subject." As a whole the book is rather disappointing, for there seems to be little that is fresh in the bulk of the papers. Discussion revolves largely round the ancient difficulties. Law seems to imply constraint, and yet the sanctions of conventional rules are often more severe than those of rules which admittedly belong to positive law. (How tired one is of that obligation of the gentleman to fight a duel!) Law and conventional custom appear to differ, and yet law sometimes incorporates custom not only indirectly but by specific reference. Morality is said to relate to the internal forum only, whereas law is external, and yet—if the reviewer may put it in his own way—the only duty recognisable in the internal forum is that of following the dictate of one's conscience, and if this is so there can be no further discussion of the rules of ethics. A cannot ask B what A's conscience prescribes, although A certainly often does ask B what B thinks is A's moral duty in certain given circumstances. Professor Louis le Fur, who presided at the Meeting of the Institute, and had an opportunity of seeing the papers before they were read, finds, however, that they show a certain amount of progress towards agreement, in particular as regards four points—the recognition of the specific nature of law, the affirmation that all law presupposes a subject, the existence of a rule of law different from positive law by which positive law can be tested, whether this be called "natural law" or something else, and lastly the possibility of finding criteria which will distinguish law from the other social sciences. Nevertheless, some justification for scepticism may be derived even from this admirable article itself, for Professor le Fur is bound to admit that a rule of law is *complete* only when it is both calculated to promote the well-being of a given society and when social assistance is assured to those who apply it as well as a guarantee given against interference by those who violate it. If the latter characteristic is lacking there is natural but not positive law, if the former, the law is positive only, but, though it may be bad, is still law. It will be peculiarly interesting to see what contribution Professor le Fur makes at the meeting this year, when the subject is "Bien commun, Justice, Securité juridique." This subject will also give more scope to the activities indicated by the second part of the Institute's title—"Sociologie Juridique"—which in 1936 most contributors evidently regarded as outside the subject. The paper which

seemed most original and interesting to the reviewer, that by Professor John Dickinson, "Coutume, Reconciliation et Droit," is, however, more sociological than philosophic, for it treats in a highly illuminating manner not only of the development of law through the reconciliation of interests, but of the development of interests through their recognition by society. Professor Kelsen also, apparently to the astonishment of those who took part in the discussion of his paper, deserted the realm of "pure law" for a sociological investigation into the relation between law and belief in the immortality of the soul. He distinguishes, especially in the history of Greek religion, between a period when the soul was regarded as "subject of vengeance," i.e. when the dead themselves wreaked vengeance on the living, and a period in which the dead suffered retribution for wrong that they had done in their lifetime, but in either case the conception of an immortal soul is one which is intimately bound up with that of justice and thus with the normative, not the causal domain. Connection with the author's previous work is thus not lost, and it was surely a good answer to Mr. Gurvitch's criticism that if similar results are reached by different processes, that is a point in favour of, rather than against, their accuracy. The treatment of Greek religion is necessarily summary, and for full discussion we must wait for some longer publication by the author, but there is enough in this paper to show that his views will not easily be accepted. Professor Goodhart's contribution, though very short, is also important, for he puts forward the view that the characteristic English conception to-day is that law is based on the recognition that anyone who wishes the state to exist must obey those rules which are necessary to its existence, and that anyone who violates a rule laid down by the supreme legislature is *pro tanto* denying the authority and thus the existence of the state.

H. F. J.

EQUITY. By F. W. Maitland. Revised Edition by John Brunyate, M.A. Cambridge University Press. **15s.** net.

It is no reflection upon the work undertaken by the learned editor to say that a new edition of Maitland's *Equity* leaves a curiously imperfect impression in the mind of the reviewer. Some well-known legal classics have gained an added value by editing, but it is doubtful whether Maitland's lectures can be included in that class. The main difficulty is the style in which the lectures are written, overflowing with personal idiosyncrasies, but there are others. Whatever legal topic he discusses, Maitland fixes you with an eye as compelling as the Ancient Mariner's, while he dissects the succession of legal institutions, holds up a few of their more important parts for your consideration (or occasionally for your amusement), and then puts them together again, before tossing them aside. The editor's function, therefore, seems to be confined by Maitland's dominating personality to the task of sweeping up any of the bits which the lecturer has either forgotten to reassemble, or has entirely overlooked.

Maitland delivered these lectures over a period of eighteen years. During that time they probably suffered considerable modification. Some topics were apparently jettisoned; others were expanded, and threads of argument were extended in some cases into complete discourses, until the living product was caught within the covers of a volume three years after

his early death, and was so given a semi-permanent form. It is in this form that the lectures have stamped themselves unforgettably upon the minds of successive generations of law students. Once you have read them, Equity can never again be a dead thing, even though opportunities may be lacking for prolonged study of it. Maitland's influence, moreover, has extended far beyond the lecture room of this country. It is plain, for example, that M. Levy-Ullmann's *English Legal Tradition* owes something of its spirit to Maitland, and in particular, to these lectures. They stand like a rock in the shifting seas of modern English law.

As published in 1909, Maitland's *Equity* represented the sum of nineteenth century developments in the Court of Chancery. In spite of the vast resources of his historical knowledge, the author conceives his task to be primarily to state what it is that the nineteenth century Equity judges have been building. There is almost nothing about Nottingham and Hardwicke, no mention is made of Lord Mansfield beyond the fact that his opinion in *Burgess* v. *Wheate* (1759), 1 Eden 177, did not prevail, and there are only scattered references to Eldon. This was obviously deliberate. Maitland wanted to show that Equity was as vital a force in English law after 1873 as it had been a century before, and that its province was as plainly defined as it had ever been. These lectures, indeed, were framed in the interesting period in which the theory of "fusion" in English Law by the Judicature Acts was finally being rejected; and they played no inconspicuous part in the rejection of that theory. The twelfth lecture upon *The Present Relations of Equity and the Common Law* has done a good deal towards setting the profession upon the proper path, and the accuracy of the predictions concerning the future relations of Law and Equity is the product of remarkable insight into the nature of each.

The Property Acts of 1925, however, affected the relations of Law and Equity a good deal more profoundly than the Judicature Acts, 1873–5. It is doubtful whether Maitland's classification of an equitable right as a right *in personam* can stand, in view of the fact that many equitable interests are now registrable, and if registered, they bind, irrespective of notice. Mr. Brunyate has wisely left Maitland's text substantially unaltered, and therefore all the familiar arguments upon this point are set out in the ninth, tenth, and eleventh lectures. What Maitland would have made of an unregistered puisne mortgage since 1925, it is difficult to conjecture; but nothing emphasises the distance we have travelled in Equity since 1906 more than these three lectures; and Mr. Brunyate's careful and frequent notes to the text of these three lectures merely afford the reader frequent reminders of that fact.

The same point reappears with regard to Maitland's two lectures upon the Administration of Assets. The law upon this difficult topic was completely altered in 1925, and many, though unfortunately not all, of the complexities elucidated by Maitland, are now of historical interest only. The two lectures, therefore, now serve merely as a historical introduction to the excellent note provided by the editor upon pp. 270–276. It is obvious, however, that the student is going to have difficulties with this section, even with Mr. Brunyate's careful assistance. For example, the statement on p. 255 that "at the present day we seem to have two or perhaps three kinds of equitable assets, all other assets being legal" (with a reference immediately after to copyholds) is fruitful of difficulties. It is not easy to see what Mr. Brunyate could have done with statements of this type, but we are sorry to see them remain nevertheless. Moreover, it is a little

puzzling to see why the lecture on mortgages has been brought forward to interrupt Maitland's exposition of the nature of a trust. It is true that Maitland himself interrupted his discussion in order to discuss the present relations of law and equity, but if a change was to be made, should not that valuable chapter have been placed earlier in the scheme?

These criticisms sufficiently illustrate the difficulty of Mr. Brunyate's task, which was clearly based upon the assumption that Maitland's text should be left, as far as possible, unaltered. That the learned editor has added lengthy notes of great value and striking lucidity goes without saying. A number of them form in themselves distinct contributions to the literature of modern Equity. The reviewer, however, would have liked to see the student's attention drawn to the fact that ademption bears another important meaning besides that discussed by Maitland in Lecture XV, and would have welcomed a discussion of *Lawes* v. *Bennett* (1785), 1 Cox. 167 in relation to *Re Carrington*, [1932] 1 Ch. 1. Indeed, this lecture has always seemed to the reviewer a little sketchy, and possibly the least satisfying of them all.

To sum up, Mr. Brunyate has given us an edition of Maitland, which not only incorporates the changes in the law effected by the Property Acts, but which also indicates the twentieth century point of view with regard to Equity. If the impression left is that mentioned at the beginning of this review, that is because Mr. Brunyate is dealing with a work which would have proved intractable in the hands of any editor.

G. W. Keeton.

THE MODERN LAW OF REAL PROPERTY. 4th Edition. By G. C. Cheshire, D.C.L., M.A. London: Butterworth and Co. (Publishers) Ltd., 1937. Pp. xlviii, 850, & 68. Price **30s.**

It was formerly usual for text-books on the eminently practical subject of land law to be written by distinguished conveyancers. It is now the fashion for them to be produced by academic lawyers whose works have certain advantages and certain disadvantages as compared with those of the last generation. They have the advantage that the basic principles of the land laws are more clearly stressed, but the disadvantage that the same familiarity with detail and with the practical workings of the law is not displayed. Of these modern works, Dr. Cheshire's excellent book is deservedly the most popular, being well-written, clear, and generally accurate, if perhaps not always logically arranged. In this last respect, however, the new edition represents a great improvement, as the learned author has undertaken a far more drastic revision of the text than any which had formerly been attempted. Not only have a number of dubious statements been removed, but several sections have been entirely re-written and re-arranged. The most important of these is the section on restrictive covenants which has been removed from its illogical and confusing position in the chapter on terms of years, and accorded an excellent section of its own following the chapter on easements and profits. There is also a new and clearer account of the modern rule against perpetuities, where, however, the application of the rule to powers of appointment still requires fuller treatment. The sections on concurrent interests and priority of mortgages have also been re-written and expanded, but it is felt that the treatment of the latter is somewhat confusing; we wish, for example, that Dr. Cheshire would explain more clearly the inter-relation

between registration under the Land Charges Act and the rule in *Dearle* v. *Hall*. The accounts of the administration of assets (where we miss a reference to *Re Thompson*, [1936] Ch. 676) and of the effect of abandonment of possession by a wrongful possessor have been amplified. Despite these and other additions, the size of the book would, it is stated, have been diminished but for the publisher's desire to add references to the English and Empire Digest and to Halsbury's *Statutes*—a doubtful boon in a book intended for students. In the preface, however, Dr. Cheshire registers "a mild protest against the cult of the short book." "Brevity," he says, "may be the soul of wit, but it is not always an aid to comprehension, and at any rate it is scarcely calculated to beget that perfect understanding of the darker side of real property law to which it must be presumed all students aspire." While we entirely endorse this view, we would respectfully submit that it is equally no aid to comprehension to deal with the same topic in several places. This habit undoubtedly accounts in some degree for the length of Dr. Cheshire's book. This is particularly true of the subject of settlements, an understanding of which is essential if the student is to acquire any true grasp of real property law. At the moment this topic is dealt with somewhat superficially in four different places; namely, in the Introduction and in the sections on entailed interests, life interests, and conveyancing. Not only is this confusing, but it leads to frequent illogicalities; for example, a chapter on equitable life interests is not the proper place for a discussion of the powers of an estate owner under the Settled Land Act. It is suggested that if in the next edition the whole subject of settlements could be dealt with once and for all in a separate chapter preferably near the beginning of the book, a far more adequate treatment could be given in less space. We should also like to see a somewhat clearer account of the inter-relation between the rule in *Wheeldon* v. *Burrows* and sect. 62 of the Law of Property Act, 1925, and of the distinction between the "equity of redemption" and the "equitable right to redeem."

These suggestions are, however, merely thrown out in the hope that they may receive consideration when the next edition is called for. This book is, and will remain, the most widely read and recommended text-book on real property law. The new edition is even better than the last; the next could be better still if only Dr. Cheshire were prepared to collaborate in its preparation with an experienced practitioner in conveyancing.

L. C. B. G.

THE INDIAN FEDERATION. By Sir Shafa'at Ahmad Khan, Litt.D. (Trinity College, Dublin). Macmillan and Co. Limited, London, 1937. **15s.** net.

This exposition and critical review of the Indian Federation, as the sub-title describes the book, is the work of one who has lately been Chairman of the All-India Muslim Conference, Delegate to all three Sessions of the Indian Round Table Conference, and to the Joint Select Committee of Parliament on Indian Constitutional Reform, 1933. The author states that he writes as a layman in legal knowledge, but he played a prominent part as delegate in the negotiations and discussions during the five years which preceded the enactment of the Government of India Act, and may be regarded as an Indian authority of distinction upon the subject of the

new Constitution. So far as exposition is concerned the book gives a full account of the long process of Constitution making. The constant pressure of Indian opinion for further concessions naturally receives prominence. One cannot accept all the author's views of the probable effect of the Constitution when it comes into actual operation, e.g. his confidence "that the question of conflict between the Provinces and the Federation will not arise for the simple reason that the spheres of the two are strictly defined." The author fully appreciates that the absence of any guarantee of responsible government at the Centre is a feature common to the Constitution Acts of all the Dominions, except the Irish Free State, and that it finds no place in the Constitution of the United Kingdom itself. Recent events tend to show that Congress, like the Colonial emancipation parties in the past, is unwilling to recognise that the absence of such a guarantee is no bar to the attainment of full responsible government. Safeguards in a written Constitution do not in practice always work as they appear plainly to be intended.

No one will deny that a Federal Constitution which embraces in its membership two distinct types of units—the Provinces of British India and the Native States—is fraught with the certainty of legal complexities hitherto unknown and therefore unsolved. Given even the most favourable atmosphere the experiment is one of extreme boldness, and political India offers no such atmosphere. Sir Shafa'at Khan is of opinion that the Centre must overwhelm the Provincial units when the Constitution comes into full operation. It may be doubted whether a Federation embracing such diverse elements as the Native States where dissident opinions are virtually non-existent and the Provinces where the problem of minorities is ever present in the political, social and religious field can remain strong, no matter how strongly it be bolstered up by statutory safeguards. So far as the Provinces are concerned the fact that Provincial autonomy antedates the coming into force of the Federation should secure a measure of experience and, therefore, of strength which will be lacking at the Centre when Federation is achieved. Moreover, the limitations placed upon the activities of the Federal Government, partly in order to secure the adherence of the Native States, should tend to prevent this result, unless, of course, the scheme of Provincial autonomy breaks down on the issue of non-co-operation. If this occurs, admittedly the official rule of the Governors and the Civil Service will tend towards centralised administration.

On the critical side the author finds himself in a difficulty. He is a Moslem. British rule has secured his race protection in the past against Hindu superiority. Parliament has sought to enforce safeguards in Moslem, interests. But experience shows that constitutional safeguards when opposed by an overwhelming majority tend to be ineffective; the Moslem therefore, must begin to accommodate his views to those of the Hindu. Perhaps this dilemma, as Lord Meston's review of this book elsewhere has suggested, is responsible for some of the inconsistencies expressed by the author in his effort to echo Hindu opposition to the Constitution.

The book ends with a note of optimism—"safeguards need not frighten us—Lord Elgin's conduct in Canada will be followed by Governors—a capable team driven (*sic*) by an enlightened Governor-General will . . . prepare India for complete equality with the other members of the British Commonwealth of Nations in an exceedingly short time."—"I feel convinced that the new Constitution will be used by many responsible and

representative organisations in India for what it is worth, and the possibility of breakdown in most Provinces is remote." Here is optimism characteristic of an oriental temperament with a vengeance. If we do not share it, it is not from ill-will. All well-wishers of India will appreciate this book, written in excellent English though somewhat marred in parts by the picturesque exaggeration of language. Students will find the Appendices—a dozen in number—admirable, containing as they do most of the more important documents which have been issued since 1935 as steps to the introduction of the working Constitution which has now been achieved so far as concerns Provincial autonomy, despite the refusal of Congress to take office.

E. C. S. Wade.

CABINET GOVERNMENT. By W. Ivor Jennings. Cambridge University Press. 1936. Pp. xii, 484. **21s.**

The purpose of this book is best explained in the author's Preface: it is "to explain what 'His Majesty's Government' is and how it functions," with the limitation that it is concerned with the political part of the administrative system and not with the detailed administration. "Parliament appears, therefore, as a forum for the criticism of the Government, and party as the means by which the Government achieves power." The size of the book shows that this limitation was wise and perhaps necessary, but the fact that the angle of view is that of the Government has not prevented the author from bringing out the essence of matters with which he is not primarily concerned.

It is a very fine work. The difficulty of writing about an institution that functions in secret is obvious: Dr. Jennings has collected what data are available and has analysed them with consummate skill. He takes the view that the Reform Act of 1832 so altered the Constitution that earlier precedents are inapplicable to modern conditions. It might be argued from the effects of subsequent extensions of the franchise that the earlier precedents since 1832 are now of doubtful utility: some of these (for instance the "dismissal" of Lord Melbourne in 1834) are examined only to be discounted. They could not have been omitted for in effect the book fulfils two functions; it is a work of reference that will take its place as the standard treatise, and it is also an exposition of the Government as a living and working body. We should feel grateful for being provided with a combination of these in a thoroughly readable form, and the reviewer feels a little ungracious in suggesting that students might find the book more convenient if there was more distinction between the "reference material" and the modern working. In one respect the author has been very kind to students (and to the more learned who have but moderate memories) in his use of appendices; it is of great assistance to be able to refer to an appendix on Governments since 1835 and to the biographical notes. The appendix on the British Administrative System is perhaps too much of a catalogue to be illuminating. Another appendix gives further discussion at the time of the Home Rule Bill of 1913; this is a technique which might have been used more freely, for it makes the exposition in the body of the book far easier to follow and yet provides adequate material for more detailed study and consideration.

The bulk of the work is based on published data, and here the references are copious. On recent events where the material is scanty the author has

shown reticence and has been careful to point out the limitations of available information. The author's tendency to minimise the distinction between law and convention may lead to ambiguity: thus the submission of treaties to Parliament (p. 373) needs amplification, or at least a reference to further authority; McNair in *British Year Book of International Law*, 1928, p. 59, might be cited.

It is unlikely that anyone will in the near future examine again all the volumes of memoirs and papers that Dr. Jennings has mastered. His work must hold the field as the most authoritative and illuminating account that has appeared.

R. M. Jackson.

THE BRITISH CIVIL SERVANT. Edited by William A. Robson. George Allen & Unwin Ltd., London, 1937. Pp. 254. **7s. 6d.**

This is a collection of eleven essays[1] on the personnel of the public services, Home, Indian and Colonial. Dr. Robson, who has edited the book and contributed a general discussion of the public service, explains the general line of approach when he says: "The key to understanding the public service lies in a study of the conditions of employment the official is offered and the code of conduct he is required to observe" (p. 12). For the contributors who deal with the higher grades the questions are: What qualities should a public servant possess, and do the present methods of recruitment and conditions of service succeed in producing satisfactory officers? Here we meet the difficulty that the educational requirements virtually restrict appointments to university graduates, and it is open to doubt whether the training given by the universities is particularly suitable. The reviewer's experience of university teaching suggests that more depends on the outlook prevalent in a university than upon the names of the courses of study: the subject does matter, but a change of curriculum does not guarantee a change of outlook. The plea (at p. 103) for more general teaching of the use of statistics is very welcome. The essays on the lower grades show that the major problem is that of promotion. In Local Government it is argued that the chief officers should be administrators, with professional and technical advisers subordinated, whilst in the Civil Service it is said that technicians do not get opportunity to exert sufficient influence. The essay on the Personnel of the Semi-Public Services shows many matters that urgently require attention.

It is a book that should be read by all who are interested in public affairs. Some of the issues raised could be settled only in a different order of society. We cannot democratise a service unless we democratise education, and the problems of the lower grades are the problems of the bulk of the population. Yet the authors show us that there is plenty of scope for desirable changes that could be made within the present system.

R. M. Jackson.

[1] "The Public Service," William A. Robson; "The Home Civil Service," Prof. Ernest Barker; "The Foreign Service," the Hon. Harold Nicholson, M.P.; "The Middle and Lower Grades of the Civil Service," A. J. Waldegrave; "Local Government, The Chief Officers," Sir Ernest Simon; "Local Government, Middle and Lower Grades," L. Hill; "The Personnel of the Semi-Public Services," Herman Finer; "The Expert in the Civil Service," F. A. A. Menzler; "Women in the Civil Service," Ray Strachey; "The Indian Civil Service," John Coatman; "The Colonial Service," Leonard Barnes.

MAITLAND: SELECTED ESSAYS. Edited by H. D. HAZELTINE, G. LAPSLEY, P. H. WINFIELD. Cambridge University Press, London, 1936. **12s. 6d.** net.

The present selection brought up to date by the editors as regards quotations and some supplementary notes comprises, according to the learned editors, those of Maitland's essays which are likely to be most useful to the student of law, history and politics. With the exception of the "Introduction to *Memoranda de Parliamento*"—a piece of historical research outside the scope of this Journal—these essays form a unity. They are variations on the theme of corporate personality.[1]

Maitland's essays make the student realize that the really great jurist is never a specialist in the same sense as the overwhelming majority of lawyers, academic and others. These essays must give equal satisfaction to the historical, the analytical, the comparative lawyer and, last, not least, to those interested in the sociological function of law. Without a profound insight into problems of sociology and national psychology, an essay like that on "Trust and Corporation" could never have been written. This may also account, to some extent, for the fascinating power of Maitland's style. Legal institutions, under his hands, begin to live, they become almost human. A metaphor like: "Our unincorporate bodies have lived and flourished behind a hedge of trustees," reveals more than pages of textbooks.

No better tribute can be paid to the lasting value of Maitland's work than to examine briefly some of his principal theses in the light of law and society of to-day. What Maitland has to say about the position of the Crown as Corporation is still as important as ever. Maitland deplores the absence of a clear separation between the King as a person and the Crown or the State or the Commonwealth as an entity (cf. Wade and Phillips, *Constitutional Law*, 2nd ed., p. 70). It appears that in English Law the term Crown still covers at least three different meanings—

1. The King as a private person owning property, etc.

2. The King as symbolizing the function of Government as a whole.

3. The King as one organ of modern constitutional life with certain limited functions.

Every modern "Rechtsstaat" is faced with the problem of keeping distinct the State in its dual aspect as "Staat" and "Fiscus," as exercising authority over its citizens and as subject of private rights and duties, side by side with other legal personalities.

The essays on "The Unincorporate Body" and on "Trust and Corporation" treat essentially the same problem. To the continental lawyer the real significance of the English trust is a mystery, and the current textbooks, taking the institution more or less as a matter of course, throw little light on the matter. To the present reviewer, as undoubtedly to many others, the reading of Maitland's essays has been something of a revelation. There one finds explained with concise lucidity the social conditions under which trust has developed, and the social ends it has served.

> "First and last the trust has been a most powerful instrument of social experimentation. . . . It (in effect) enabled the landowner to

[1] The titles of the essays are: The Corporation Sole, The Crown as Corporation, The Unincorporate Body, Trust and Corporation, Moral and Legal Personality, The Body Politic.

devise his land by will until at length the legislature had to give way. . . . It (in effect) enabled a married woman to have property that was all her own until at length the legislature had to give way. It (in effect) enabled a man to form joint stock companies with limited liability, until at length the legislature has to give way.

"But there are two achievements of the trust which in social importance and juristic interest seem to eclipse all the rest. The trust has given us a liberal substitute for a law about personified institutions. The trust has given us a liberal supplement for a necessarily meagre law of corporations." (Pp. 134, 135.)

Maitland's main concern is to show (1) how the trust has solved most of the tasks which, e.g. German Law has solved by various types of corporate personality, (2) how English law manages to produce quite good results with rather inadequate legal categories and fictions abhorrent to the systematic mind. Maitland saw that trust could not fit into the neat division of the Civil Law into Schuldrecht and Sachenrecht. Despite that difficulty, recent economic developments (like holding companies) and the necessity of adjusting the German system to international transactions such as the Dawes and Young Loans have led to a considerable development of Treuhand in modern German Law. But it has remained within the limits of the system, and its functions will never be anything like those of the English Trust. Above all, Treuhand has not and will not become a substitute for corporate bodies, the very thing that Trust has done for English Law. It has (*a*) given a legal form to charities, where German Law creates a special institution with legal personality, the "Anstalt"; (*b*) provided the "hedge" (Maitland), behind which the life of unincorporate bodies can flow undisturbed. Maitland's observations on these functions and his comparisons with the institutions of German Law, are masterpieces of comparative legal psychology. In German Law, the purpose is personified and given a perpetual structure. As to English charities, Maitland says: "Our way of escape was the trust. Vest the lands, vest the goods in some man or men. The demand for personality is satisfied. The lands, the goods have an owner; an owner behind whom a Court of Common Law will never look. All else is mere Equity."

The problem of unincorporate bodies is more complex. Socially, they are probably much more important in England than in Germany, but legally English Law seems little more to know about them than that their property is vested in trustees, while the German Civil Code deals with them in detail, giving them a legal position that, in most respects, especially in all those concerning the internal corporate life, is similar to that of corporate bodies with conferred legal personality. Now everyone knows that English clubs, or institutions like the Stock Exchange, the Inns of Court, Lloyd's, the Trade Unions, have as strong corporate personality as any corporation, and yet they are unincorporated. Maitland leaves it at that and remarks: "It has often struck me that morally there is most personality where legally there is none." But can the law rest content with that? Is it enough to say that the property of unincorporated bodies is vested in trustees and that the liability of members is limited to and by contract? Of all the corporate life that is, for example in a club, trust says nothing. It is merely a device for holding property, a proper hedge. How disastrous the legal consequences of such a state of affairs may be, the Free Church Case has shown. When we look more closely, we find that in most essential

respects the legal, not only the moral rules which govern the life of unincorporated bodies, differ little from those of incorporated bodies. Members of the former submit to the laws governing the life of the body corporate, as determined by the majority resolution; members of the latter are only bound by contractual obligation, entered by every member separately. But the difference is one of form rather than of substance. The rules, to which a member of a club is supposed to consent by contract, are of a standardised nature; there is no mutual adjustment of two independent wills which is the essence of contract. The standardised rules have become fixed and unassailable, whether the rules are those of Winchester College (incorporated) or those of the Middle Temple (unincorporated). It is true that, in the case of unincorporated associations, the member is not bound by anything to which he has not, expressly or impliedly, agreed (*Wise* v. *Perpetual Trustee*, [1903] A.C. 139); whereas in the case of corporations the member is bound by law to submit to the Memorandum to the Articles of Association. But the rules of an unincorporated club, to which new members just have to agree, will mostly say that certain decisions of committees, trustees, etc., are binding for members. What matters, not only socially, but legally, is the absence of equality of partners. Law Courts will, on the whole, decline to interfere with the internal decisions of associations, whether incorporated or not. (*Weinberger* v. *Inglis*, [1919] A.C. 606; *McLean* v. *The Workers' Union*, [1929] 1 Ch. 402.

The difference is more marked as regards the position towards third persons. Corporations are liable for torts, unincorporated bodies are not. But even there the Taff Vale case has largely wiped out the distinction.

Why, then, is the whole difference between incorporated and unincorporated bodies preserved? Why do the leading unincorporated associations with many distinguished lawyers among them, refuse to avail themselves of the obvious advantages of simplicity offered by incorporation?[1] Little could be added to what Maitland observed 33 years ago—

> "Apparently there is a widespread, though not very definite belief, that by placing itself under an incorporating Gesetz, however liberal and elastic that Gesetz may be, a Verein would forfeit some of its liberty, some of its autonomy, and would not be so completely the mistress of its own destiny as it is when it has asked nothing and obtained nothing from the State."

One more problem suggested by Maitland's searching inquiry may at least be mentioned. How far do differences of legal treatment correspond to differences of the social life behind it? Does the hiding of corporate life behind the hedge of trustees, chosen by English lawyers as compared with the German Law on unincorporated associations, reveal profound differences in the group life of the two nations? The answer is not easy. Certainly the difference between English and German Law on unincorporated bodies shows the emphasis of the English on personal and individual responsibility, and the emphasis of the German on the collective. But nevertheless, legal internal autonomy, limitation of member's liability, responsibility for torts, are very similarly treated in both countries. Nor can these

[1] A striking illustration of the unsatisfactory results produced by the existing state of affairs is given in *Wurzel* v. *Houghton Services* and *Wurzel* v. *Atkinson*, [1937] 1 K.B. 380.

analogies be relegated to the realm of social life as opposed to legal forms. The way in which the life of a club is regulated is not only a social, but also a legal phenomenon.

The foregoing remarks can do no more than to show how stimulating for further inquiry Maitland's essays are. Not the least of the tasks which none could have solved more brilliantly than Maitland himself, but which has yet to be tackled, is that of building up a comparative Jurisprudence on a sociological rather than a purely analytical basis.

W. FRIEDMANN.

Ready Shortly

ENGLISH LAW FROM THE FOREIGN STANDPOINT

By HANS W. GOLDSCHMIDT, Dr. Jur., Dr. Sc. Pol., *formerly Professor in the University of Cologne.*

This book forms a general introduction for foreigners to the fundamental principles of English law. It compares English law with Continental systems, principally the German, Italian, and French, and provides foreign students, trained in these systems, with an understanding of the essential differences between the English approach to legal problems and their own. It also provides the English lawyer with a valuable insight into Continental conceptions of English law. 276 pages. 21s. net (by post 21s. 6d.).

Second Edition

THE LAW OF TRUSTS

By GEORGE W. KEETON, M.A., LL.D., *Barrister-at-Law.*

A clear and straightforward explanation of the principles of law and equity governing trusts and trustees. The new edition includes recent decisions. 358 pages. 25s. net (by post 25s. 6d.).

"We recommend 'Keeton' wholeheartedly to practitioners and students alike."
—LAW NOTES.

Order from a bookseller or direct from

PITMAN, Parker Street, Kingsway, London, W.C.2